Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

ARTHUR CUTSHALL,

Petitioner,

v.

DON SUNDQUIST, Governor of the State of Tennessee,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Tennessee Sexual Offender Registration and Monitoring Act (the "Act") constitute an intentional punishment that, when applied retroactively to Petitioner, violates the Ex Post Facto Clause or Double Jeopardy Clause of the U.S. Constitution? Alternatively, does the Act violate Petitioner's due process rights?

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 193 F.3d 466 (6th Cir. 1999). A copy of this opinion is included in the Appendix at Appendix A. The order and memorandum issued by the District Court for the Middle District of Tennessee on the parties' cross-motions for summary judgment are reported at 980 F. Supp. 928 (M.D. Tenn. 1997). Copies of this order and memorandum are included in the Appendix at Appendix B. Copies of the order and memorandum issued by the District Court for the Middle District of Tennessee on Petitioner's motion for preliminary injunction are included in the Appendix at Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on October 4, 1999. On October 18, 1999, Petitioner filed a petition for rehearing with the Court of Appeals and a motion for leave to file petition out-of-time. The Court of Appeals allowed the petition for rehearing to be filed but, on November 19, 1999, denied the petition for rehearing. A copy of the order of the Sixth Circuit denying Petitioner's petition for rehearing is included in the Appendix at Appendix D. This Petition for Writ of Certiorari is filed within 90 days of the entry of the Court of Appeals' opinion. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I, § 8, cl. 1
Ex Post Facto Clause

No State shall . . . pass any ex post facto Law . . .

U.S. Const., art. IV, § 2, cl. 1

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const., amend. V,
Double Jeopardy Clause

No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . .

U.S. Const., amend. XIV, § 1
Due Process Clause

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Sexual Offender Registration
and Monitoring Act
Tenn. Code Ann. §§ 40-39-101 to -108

The Act, as codified in 1995, is contained in the Appendix at Appendix E at 75a-86a.

STATEMENT OF THE CASE

In 1994, the Tennessee state legislature passed the Sexual Offender Registration and Monitoring Act ("the Act"), which took effect on January 1, 1995 but which applied retroactively to persons convicted of sexual offenses prior to the effective date. (R. 22, Def.'s Add. at 1; J.A.1, at 48.) The Act as

originally passed by the Tennessee legislature did not contain a statement of purpose or intent. (R. 22, Def.'s Add. at 1-7; J.A.1, at 48-54; *see* App. E at 75a-86a.) The legislative history of the Act, however, contains clear expressions of legislative intent.

Representative Brenda Turner, who introduced the bill in the House, stated that the Act was intended to "aid the citizen's self-protection, assist in law enforcement investigations and provide a deterrence for offenders. . . ." (R. 22, at 30; J.A.1, at 78.) Representative Turner further summarized the intent of the Act as follows:

> The intent of legislation establishing sex offender registry is generally fourfold. Provide a tool for law enforcement officials to use in the investigations. Aid in citizen self protection. Serve as a deterrent effect on offenders by ending their anonymity in the community, and provide legal grounds for holding known offenders in suspicious circumstances.

(R. 22, at 30; J.A.1, at 78; *see also* R. 22, at 32; J.A.1, at 80.)

The Senate sponsor of the bill, Senator Crow, repeatedly stated that the Act was intended to deter convicted sex offenders from traveling to Tennessee and encourage convicted sex offenders to leave Tennessee. (R. 22, at 35, 42, 49, 55, 57; J.A.1, at 83, 90, 97, 103, 105.) Senator Crow believed that with passage of the Act "we'll see sex offenders leaving Tennessee and you won't see them coming in." (R. 22, at 35; J.A.1, at 83.)

The state legislators repeatedly indicated that the Act was intended to deter sexual offenses and make it easier to re-incarcerate them if deterrence fails. For instance, Representative Turner also stated:

> And this is the procedure to establish and make a statement to the state of Tennessee that we do not want these people, these pedophiles and repeat offenders to continue to repeat this offense in the state of Tennessee without answering the call, losing their probation, losing their parole, being reincarcerated and recharged, unfortunately after another offense, or sometimes preventing the offense from occurring again.

(R. 22, at 47; J.A.1, at 95.) And Senator Rochelle stated that the Act provided "an opportunity to take a large step to prevent reoccurrence of sexual offenses. . . ." (*Id.*) In short, the legislative history contains numerous indications that deterrence of crime and deterrence of travel to and residence in this state by sexual offenders — by imposition of heavy registration and monitoring burdens, the threatened and actual release to the public of Sex Offender Registry information, and the threat of criminal sanctions for violations of the Act — were primary goals of the Act.

The Act imposes considerable registration and monitoring requirements on convicted sexual offenders who have been released from custody, regardless of type of offense.[1] (R. 22, Def.'s Add. at 2; J.A.1, at 49.) The Act requires offenders to place themselves on the Sex Offender Registry within ten days of their release and to respond to quarterly requests for information updates within ten days of the receipt of such requests. (R. 22, Def.'s Add. at 3-4; J.A.1, 50-51.) The information that must be provided by registrants includes name, aliases, driver's license

1. The Act covers a wide array of sexual offenses, from statutory rape and solicitation to incest and aggravated rape. (R. 22, Def.'s Add. at 2-3; J.A.1, at 49-50.) Unlike some other states' versions of "Megan's Law," Tennessee's version does not differentiate between types of offenses nor between levels of risk but rather applies all provisions of the Act to all types of the targeted offenses.

information, Social Security Number, race and gender, home address and length of residence, and name and address of current employer and length of employment, and may include a current photograph. (R. 22, Def.'s Add. at 4, 19, 24-25; J.A.1, at 51, 67, 72-73; Tenn. Code Ann. § 40-39-103 (1999 Supp.).) In addition, registrants must notify the Tennessee Bureau of Investigation ("the TBI") every time Sex Offender Registry information changes (even temporarily, which is defined to be a period longer than ten days), and registrants are subject to random checks by the TBI at any time to verify information submitted. (R. 22, at 19, 23, 27; J.A.1, at 67, 71, 75.) In addition to the TBI's quarterly updates and constant threat of random verification checks, the TBI is required to issue press releases, public service announcements, and engage in other public information activities "to ensure that all sexual offenders are informed and periodically reminded of the registration and verification requirements *and sanctions* of this chapter." (R. 22, Def.'s Add. at 5; J.A.1, at 52 (emphasis added); *see also* Tenn. Code Ann. § 40-39-105(e) (1997).)

According to the TBI's Standard Operating Procedures for the Act, the TBI is to distribute a list of registrants (including residence and employer addresses and other identifying information) to each registrant's local police, sheriff, and district attorney at least quarterly. (R. 22, at 16; J.A.1, at 64.) The TBI is also to report to the local district attorneys any registrants in violation status under the Act and is to request that charges be brought against such offenders (*id.*), and request that such offenders be investigated and apprehended by the local police. (R. 22, at 5; J.A.1, at 52.)

Failure to register under the Act or otherwise comply with the terms of the Act constitutes a misdemeanor for the first violation and constitutes grounds for revocation of parole or probation. (R. 22, at 6-7, 20; J.A.1, at 53-54, 68.) Subsequent violations of the Act are felonies. (*Id.*) According

to an amendment that took effect July 1, 1996, the TBI may present evidence of alleged violations by affidavit in prosecutions for violations of the Act. (R. 36, Def.'s 2d Add. at 281; J.A.2, at 376.)

The Act imposes potentially lifelong requirements and restrictions on all targeted offenders. (R. 22, Def.'s Add. at 6; J.A.1, at 53.) Ten years after release, the Act allows a registrant to petition the local circuit court for removal from the Sex Offender Registry, but a registrant may be removed from the Registry only if the court finds that (a) the registrant has complied with the Act, (b) is rehabilitated, and (c) poses no threat to society; absent such findings, registrants remain subject to the Act's requirements until their death. (R. 22, Def.'s Add. at 6, 20, 27; J.A.1, at 53, 68, 75.) Therefore, every offender falling under the Act's broad scope is automatically subject to a minimum ten-year term of continual registration and monitoring that can be removed only if a very high threshold is met, regardless of the nature and severity of the crime, regardless of past offense history, regardless of amount of time served and conduct while in custody, and regardless of condition on release.

Under the Act, information contained in the Sex Offender Registry may be provided to the general public whenever the TBI or local law enforcement officials deem the release of such information "necessary to protect the public" or "in the interest of public safety." (R. 22, Def.'s Add. at 5, 21; J.A.1, at 52, 69.) No further guidance is given to law enforcement officials as to when the release of registrant information is proper, and law enforcement officers are immune from liability for the release of Registry information when done in good faith. (R. 22, Def.'s Add. at 5-6, 17-22; J.A.1, at 52-53, 65-70.) As the District Court first hearing this case noted, "[n]o guidelines or procedures exist to rein in this broad power held by law enforcement." (R. 56, Mem. of Ct. at 3; J.A.2, at 564; App. B at 46a-47a.) Nor is any

provision made for any record-keeping of to whom information is released. Also, the Act does not require that a registrant be given any notice before or after a public disclosure of Registry information by law enforcement, nor is a registrant given any administrative or judicial right to protest the release of Registry information at any time. (R. 22, Def.'s Add. at 1-7, 17-22, 26-27; J.A.1, at 48-54, 65-70, 74-75.)

The public notification provisions of the Act significantly alter both the amount of offender information available to the public and the procedure for the release of information. Prior to the Act, almost all information about paroled offenders was confidential. Pursuant to Tenn. Code Ann. § 40-28-119(c), the Board of Parole is given authority to make rules regarding the privacy and release of parolee records. Pursuant to this rule-making authority, the Board of Parole issued Administrative Rule 1100-1-1-.14 (App. E at 91a-95a), which provides that virtually all of the information that is on the Registry would otherwise be confidential. Indeed, all personal parolee information held by the Parole Board is confidential and may not be released to the public, except for Social Security numbers that may be released to employers, and may be released to law enforcement officials only to aid in investigations. *See* Tenn. Admin. Rule 1100-1-1-.14 (1995); App. E at 91a-95a. Therefore, the Board of Parole does not release any of the information contained in the Registry to the general public.

Furthermore, information in the Sex Offender Registry would not necessarily otherwise be in the State's records. The Tennessee Department of Corrections is not mandated to record Social Security numbers, driver's licence numbers, aliases, employment locations, lengths of employment, or lengths of residence at various locations, nor to maintain current inmate photographs.[2] *See* Tenn. Code Ann. § 4-6-140(a); App. E

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2. As discussed above, pursuant to statutory authority, the Parole Board has designated virtually all of the information in the (Cont'd)

at 67a. Furthermore, neither the Corrections Department nor the Parole Board possesses, once custody and supervision have ended, current home and work address information or current photographs, and neither agency would know if a person had changed his or her name or had begun using an alias (as the person could legally do), because, of course, the records of the Department of Corrections and the Board of Parole are not updated after an individual is no longer under their supervision. Thus, information in these agencies' files may be incorrect and thus of little significance to the ex-convicts or parolees. It is only through the constant monitoring of registrants by the TBI and local officials that the State of Tennessee remains aware of the registrants' whereabouts and appearance.

Furthermore, the Act removes the greater protections that previously existed regarding the release of offender information to the public. Information is disclosed by the Department of Corrections only on written request stating why the information is requested, and individual correctional institutions are not allowed to disclose information; thus, a record of the persons requesting information exists, the Department has the right to review and decline requests, and the public must come to the Department rather than the Department initiating disclosures. *See* Tenn. Admin. Rule 0420-1-2-.01 to -.06 (1989); App. E at 87a-91a. Moreover, a charge of $10.00 plus 20 cents per copy requested must be paid to the Department of Corrections. *Id.* As an added protection for parolee records, the Parole Board

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(Cont'd)
Sex Offender Registry to otherwise be confidential after supervision of a sexual offender ends. *See* Admin. Rule 1100-1-1-.14 (1995); App. E at 91a-95a. The Correction Department's rules specifically provide that information made confidential by law will not be released. Tenn. Admin. Rule 0420-1-2-.01 (1989); App. E at 87a. Thus, the Parole Board's rules may supersede the Correction Department's rules if a parole occurs.

retains authority to determine whether a release of requested information would endanger a parolee or others and, if so, to decline the request. Tenn. Admin. Rule 1100-1-1-.14(1)(a)(10) (1995); App. E at 92a.

With passage of the Act, the police may now, on their own initiative and without any request by the public, disclose a registrant's aliases, current home address and telephone number, current work address and telephone number, length of time at a given residence and job, and Social Security number to anyone and not simply employers, and may distribute current photographs. Such information was not subject to voluntary disclosure to the public before passage of the Act.

Once information has been released, members of the public may do with the information as they wish because the Act places no constraints on the public's use of Registry information. They may, for instance, place the information on the Internet, in ads in local newspapers, on billboards, or publish the information through any other medium. The public may very well use the information to locate offenders and their families so that they can attack them, harass them, or otherwise seek to drive them from the community, as has happened on several occasions. *See Doe v. Pataki*, 940 F. Supp. 603, 608-11 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 120 F.3d 1263 (2d Cir. 1997) (detailing numerous incidents of vigilantism, at times on persons of mistaken identity, after the public was notified of offenders in their localities); *see also* James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 Yale L.J. 1055, 1088 n.151 and accompanying text (1998). The Act places no constraints on how members of the public may use the Registry information given to them and provides for no sanctions in the case of misuse of Registry information.

In January, 1990, before passage of the Act, Petitioner entered a guilty plea to aggravated sexual battery and received a sentence of twelve years incarceration. (R. 18, 1st Am. Compl. at 1-2; J.A.1, at 37-38; R. 22, Def.'s Add. at 279; J.A.1, at 316.) The state of Tennessee released Petitioner from custody in September of 1997, and, on his release, Petitioner was required to place himself on the Tennessee Sex Offender Registry or face criminal sanctions. It is undisputed that the Act is being applied retroactively to Petitioner.

In anticipation of his release from custody and concomitant registration under the Act, Petitioner filed a pro se complaint against the Governor of the State of Tennessee in his official capacity seeking relief from the Act on grounds that the Act violated Petitioner's constitutional rights. (R. 1, Compl.) The District Court appointed counsel for Petitioner, and Petitioner then filed an Amended Complaint alleging claims under 42 U.S.C. § 1983 and seeking permanent injunctive relief from the Act. (R. 18, Am. Compl.)

Respondent and Petitioner filed cross-motions for summary judgment, and Petitioner filed a motion for preliminary injunction pending the district court's ruling on the motions for summary judgment. (R. 20, Respondent's Mot. to Dismiss, or in the Alternative, for Summ. J.; R. 28 Petitioner's Mot. for Summ. J.; R. 51, Petitioner's Mot. for Prelim. Inj.) On September 17, 1997, the District Court preliminary enjoined the State of Tennessee from releasing Registry information about Petitioner to the public. (R. 54, Order.) On September 25, 1997, the District Court entered a final order with a memorandum opinion in which the court partially granted and partially denied both motions for summary judgment: the District Court, without specific discussion, held the registration provisions of the Act to be constitutional; however, the District Court held that the public notification provisions of the Act violated the due process rights of Petitioner. (R. 57, Final Order.)

On September 30, 1997, pursuant to 28 U.S.C. § 1291, Respondent appealed to the Sixth Circuit the District Court's holding that the public notification provisions of the Act violated Petitioner's due process rights. (R. 58, Respondent's Notice of Appeal.) On October 20, 1997, Petitioner filed a cross-appeal, asking the Sixth Circuit to review the District Court's holding that the registration provisions of the Act were constitutional and that the public notification provisions of the Act could be constitutionally applied to Petitioner if a due process hearing were conducted before public release of Registry information. (R. 67, Petitioner's Notice of Appeal.) Petitioner specifically asked the Sixth Circuit to invalidate the Act in its entirety on grounds that, among others, (a) the Act was intended as a punitive measure in violation of the Ex Post Facto and Double Jeopardy Clauses of the Constitution and (b) the Act violates Petitioner's due process rights. In the alternative, Petitioner asked the Sixth Circuit to uphold the District Court's ruling that a due process hearing must be conducted before release of Registry information about Petitioner to the public.

Following oral argument, the Sixth Circuit issued its opinion in this matter on October 4, 1999. A majority of the Sixth Circuit panel upheld the District Court's ruling on the registration provisions of the Act and reversed the District Court's ruling that the public notification provisions of the Act were unconstitutional. The majority found that the Act was not punitive in its intent or effects and that the Act did not infringe on a protected interest of Petitioner. Accordingly, the Sixth Circuit upheld the Act in its entirety. Circuit Judge Jones dissented, stating that a due process hearing should be held before the release of Registry information to the public. Judge Jones further stated that the case should have been remanded to the District Court for supplemental constitutional findings because the District Court had limited its discussion to the due process issue.

REASONS FOR GRANTING THE WRIT

An essential premise of our constitutional system is that persons should be given fair warning of the punishments they may suffer for their acts. *See Weaver v. Graham*, 450 U.S. 24, 30-31, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). The Ex Post Facto clause of the U.S. Constitution thus proscribes the imposition of punishment after the commission of an act. *See* U.S. Const., art. I, § 10. "To fall within the ex post facto prohibition, two critical elements must be present: first, 'the law must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.' " *Miller v. Florida*, 482 U.S. 423, 430, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987) (citation omitted). The imposition of additional punishment after a conviction likewise violates the Ex Post Facto clause. *See Weaver*, 450 U.S. at 28. Similarly, a law violates the Double Jeopardy clause of the U.S. Constitution if it imposes a second punishment for a previously-punished offense. *See, e.g., Hudson v. United States*, 522 U.S. 93, 98-99,118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

In order to determine whether a law violates the Ex Post Facto or Double Jeopardy Clause, a court must first determine whether the law was intended as punishment and then, if no punitive intent is found, whether the law effectively imposes punishment. *See Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997); *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 2811-12, 125 L. Ed. 2d 488 (1993); *De Veau v. Braisted*, 363 U.S. 144, 160, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960). A law is punitive if it is intended to serve, or effectively serves, retributive or deterrence goals.[3]

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3. Legislation may not avoid the punishment label simply by claiming a preventative rather than retributive goal. "Punishment (Cont'd)

See, e.g., Kansas v. Hendricks, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (retribution and deterrence are the "two primary objectives of criminal punishment"). "Retribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell v. Wolfish*, 441 U.S. 520, 539 n.20, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) ("We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.").

The majority of the Sixth Circuit panel disregarded the legislative history behind the Act, as well as Supreme Court precedent for determining legislative intent, when it decided that the Act was not intended as a punitive measure. This case presents a proper forum for the Supreme Court to declare the role of legislative history in the determination of punitive intent. The legislative history involved in this case evinces a strong punitive intent that was not retracted or contradicted

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(Cont'd)
serves several purposes: retributive, rehabilitative, deterrent — and preventative." *United States v. Brown*, 381 U.S. 437, 458-59, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

> In determining whether punitive or nonpunitive objectives underlie a law, *United States v. Brown* established that punishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct. This view is consistent with the traditional purposes of criminal punishment, which also include a preventive aspect.

Nixon v. Administrator of General Svcs., 433 U.S. 425, 480, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977). Consistent with this rule, in 1967, this Court found that a law designed to prevent future offenses by sexual offenders to be punitive primarily because of a prevention goal, regardless of any retributive intent. *See Specht v. Patterson*, 386 U.S. 605, 329-30, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967).

by any expression of purpose in the text of the Act.[4] Petitioner submits that this legislative history is the best evidence of legislative intent, absent an express purpose in the text of the Act, and that such history provides a much better guide for determining intent than judicial analysis of the text and structure of an act or judicial speculation and supposition on what might be the proper or practical goals served by an act.

Another essential premise of our constitutional system is that persons should not be deprived of their protected interests without due process of law. U.S. Const., amend. XIV; *see, e.g., Ingraham v. Wright*, 430 U.S. 651, 674, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). There is no dispute that the Act as presently written does not provide Petitioner with notice and an opportunity to be heard with regard to placement on the Registry and release of Registry information to the public. *See Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971) (notice and opportunity to be heard essential elements of due process); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). However, whereas Petitioner asserted and the District Court found that the Act implicated a protected interest, Respondent asserted and the majority of the Sixth Circuit panel found that the Act did not implicate a protected interest. The Supreme Court should grant this

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4. The Sixth Circuit, in its analysis of the intent behind the Act, properly disregarded an amendment to the Act in 1997 that added an express statement of purpose. *See* App. A at 14a-16a, 20a; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) (intent of legislature that enacted the statute in question controls); *accord Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 758, 99 S. Ct. 2066, 60 L. Ed. 2d 609 (1979); *United States v. Wise*, 370 U.S. 405, 411, 414, 82 S. Ct. 1354, 8 L. Ed. 2d 590 (1962).

Petition in order to decide this important question of federal law concerning the scope of Petitioner's protected interests and whether such interests are implicated by the Tennessee Act and similar other laws that impose significant registration and monitoring requirements on offenders who have completed their criminal sentences.

I.

The legislative history, structure, and text of the Act reveal a punitive intent.

As detailed in the Statement of the Case above, the sponsors of the Act clearly and repeatedly stated that the Act was intended to deter future crimes by sexual offenders and was intended to deter sexual offenders from residing in or even traveling to Tennessee. (R. 22, Def.'s Add. at 30, 32, 35, 42, 49, 55, 57; J.A.1, at 78, 80, 83, 90, 97, 103, 105.) Those offenders stubborn enough to remain were warned that they would no longer be allowed to live an anonymous "cloak and dagger" lifestyle and that their acts would not go "unpunished." (R. 22, Def.'s Add. at 32; J.A.1, at 80.) The requirements and conditions of the Act were intended to be so burdensome, unpleasant, stigmatizing, and embarrassing — so punishing — that offenders would seek to avoid Tennessee or leave Tennessee if already here.

The Sixth Circuit improperly ignored this substantial evidence of punitive intent. *See* App. A at 14a-20a (no discussion of legislative history). The statements by the Act's sponsors in particular were "an authoritative guide to the statute's construction," *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982), that deserved "to be accorded substantial weight," *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96 S. Ct. 2295, 49 L. Ed. 2d 49 (1976) (citations omitted). *See also, e.g., H.J. Inc. v. Northwestern Bell Tele., Co.*, 492

U.S. 229, 246-47, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (citing statements by sponsor of the RICO Act as evidence of congressional intent); *Orloff v. Willoughby*, 345 U.S. 83, 98, 73 S. Ct. 534, 97 L. Ed. 842 (1953) (Frankfurter, J., dissenting) ("Whatever we may think about the loose use of legislative history, it has never been questioned that reports of committees and utterances of those in charge of legislation constitute authoritative exposition of the meaning of legislation.").

Consideration of the legislative history is proper and important. In the case of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), for instance, the Supreme Court found the legislative history of an act, including congressional pronouncements and debate, to indicate conclusively a punitive purpose behind an act. *See id.* at 169-84; *see also, e.g., Artway v. Attorney General*, 81 F.3d 1235, 1264 (3d Cir. 1996) (examining legislative history to determine "actual purpose" behind New Jersey's version of Megan's law). As the majority in the Sixth Circuit noted, the Supreme Court's decision in *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), directed courts to examine whether legislatures expressly or impliedly revealed a punitive or regulatory intent. *Id.* at 99. In this case, both sponsors of the Act, among others, expressly pronounced that the Act was to serve a deterrence purpose, and the legislative history contains no evidence disavowing this punitive intent. Where the text of an act is silent as to its intent, then pronouncements of legislators should be at least as good an indicator of legislative intent as that resulting from judicial construal of the text and structure of the act — particularly in a case such as this, where the Act's sponsors explicitly stated the Act's purpose.

Justice Stevens has explained why it is reasonable and necessary to rely on the statements of a bill's sponsors and

reports from congressional committees when determining congressional intent:

> Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities. If a statute . . . has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes. In such circumstances, since most members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.

Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 116 S. Ct. 637, 643, 133 L. Ed. 2d 635 (1996) (Stevens, J., concurring). In this case, the clear statements of the Act's sponsors and other legislators should have been given substantial weight and should have acted as authoritative guides to the conclusion that the Tennessee legislature intended the Tennessee Sexual Offender Registration and Monitoring Act to serve punitive purposes.

The majority of the panel likewise ignored the substantial evidence of punitive intent found in the text of the Act and in other provisions of the Tennessee Code to arrive at the conclusion that it could "find no indication that the Tennessee legislature intended the Act to be a punitive measure." App. A at 15a. A fair reading of the text and structure of the Act would have bolstered the conclusion from the legislative history that the Act was meant to serve punitive purposes.

First, the legislature's classification of the Act as a part of the criminal code (Title 40 on criminal procedure)

strongly supports the conclusion that the Act was intended as part of Tennessee's criminal justice scheme. *See Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (placement of statute within civil or criminal code significant to determining legislative intent). Second, the use of the rehabilitation requirement for removal from the Registry is intended to serve a goal typically associated with the penal system. Third, the requirement that the TBI constantly remind offenders of their obligations under the Act, and of the criminal sanctions for violation of the Act (including revocation of parole and reapprehension), *see* Tenn. Code Ann. § 40-39-105(e) (1997), strongly supports the conclusion that deterrence was a central goal behind the Act: the legislature wanted sexual offenders continually reminded that they are under the constant supervision of the TBI and that they are constantly under the threat of sanctions if they should fail to comply with the Act in any way. Finally, the legislature's classification of lifelong community supervision as a form of punishment under another statute (Tenn. Code Ann. § 39-13-524; App. E at 69a-70a) further bolsters the clear conclusion that registration and monitoring under the Act is a punitive measure.[5]

As indicated by the repeated statements of the Act's sponsors, the text of the Act, its placement in the criminal code, and the similarity between its provisions and those in other statutes acknowledged to be punishment, and by the noticeable absence of any statements to the contrary within the legislative history, the punitive goal of deterrence was central to the Act's introduction and passage and was not merely incidental to any desired regulatory effects.

5. In Tenn. Code Ann. § 39-13-524, the legislature specifically acknowledged that lifelong community supervision was a punishment "in addition to the punishment authorized by the specific statute prohibiting" the targeted conduct. Tenn. Code Ann. § 39-13-524; App. E at 69a-70a.

See Bateson v. U.S. ex rel. Bd. of Trustees, 434 U.S. 586, 591, 98 S. Ct. 873, 55 L. Ed. 2d 50 (1977) (relying on "authoritative Committee Reports" to determine congressional intent behind the Miller Act and noting significantly that "[t]here is nothing to the contrary [to that intent found in the reports] anywhere in the legislative history"). The legislature repeatedly expressed an intent that the Act serve the punitive goals of deterrence, retribution through shaming, and even rehabilitation through its requirement of a finding of rehabilitation as a precondition to removal from the Registry, and this expression of intent should have been determinative in the intent-effects analysis conducted by the Sixth Circuit.

II.

The Act infringes on Petitioner's protected interests without due process.

The District Court held that the Act implicated state and federal privacy rights and the right to seek employment of one's own choosing. (R. 56, Mem. of Ct. at 6-8; J.A.2, at 567-69.) The District Court also held that the stigma and injury to one's reputation that would result from disclosure of Registry information and the concomitant loss of privacy and employment rights satisfied the "stigma plus" test established in *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) and *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971), for determining when due process protections are triggered. (R. 56, at 8-9; J.A.2, 569-70.) Because protected interests were implicated but not protected, the District Court held that the public notification provisions of the Act "violate the due process rights of plaintiff." (R. 57, Final Order; J.A.2, at 578.) To remedy this flaw, the District Court stated that the Plaintiff should be given an opportunity to be heard before public disclosure of Registry information and should be

allowed to present evidence why such disclosure was not necessary to protect the public, and that the state should bear the burden of persuasion at the hearing. (R. 56, Mem. of Ct. at 9; J.A.2, at 570; App. B at 54a-56a.) In the District Court's opinion, "[d]issemination of information from the sexual offender registry without the control of anyone other than local law enforcement and without an opportunity for hearing offends basic concepts of fairness." (R. 56, at 10; J.A.2, at 571 App. B at 55a-56a.)

The majority of the Sixth Circuit disagreed with the District Court and held that the Act did not infringe on any protected interest of Petitioner. Petitioner submits that the Sixth Circuit erred and that this Court should find that the Act does jeopardize protected interests of Petitioner that are entitled to the protections of the Due Process Clause.

First, and most fundamentally, if the Court finds that the Act was intended as a punishment, then the Act intrudes on Petitioner's liberty interest. *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

Second, the Court should find that Petitioner has an interest in being free from the public stigma and constant supervision that the Act imposes on his personal privacy, liberty, and ability to seek and retain employment. *See Paul v. Davis*, 424 U.S. 693, 708-09, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971). The Act is intended to end registrants' "anonymity" and ultimately drive them from the community. (R. 22, Def.'s Add. at 32; J.A.1, at 80.) The state legislature specifically contemplated that, through the Act, employers would be notified that they are employing convicted sexual offenders (R. 22, at 57; J.A.1, at 105), and the public at large will also be told this fact, reasonably causing employers to fear retaliation for employing such individuals. The Act imposes a stigma on registrants that

was not otherwise present simply because of their crime and conviction, both through the Act's imposition of lifetime supervision by the police for supposedly repetitive and compulsive behavior and through its notification provisions, by which the police may inform the public that (in the police's opinion) a dangerous offender is in their midst who is to be watched and avoided at all times. Being convicted of a crime, particularly a serious crime, may well be stigmatizing in and of itself. However, other criminals, even those convicted of crimes more serious than those included in the Registry, once they have completed their sentences, are not constantly under the threat of community ridicule and scorn by actions of the police without notice or recourse, are not branded worthy of continual, lifelong police supervision, are not required to inform the police of their every movement for the rest of their lives (subject to possible immediate apprehension even for accidental violations of the Act), and are not generally made to prostrate themselves before law enforcement officials for the rest of their lives. Such other criminals are, in a very real sense, free once they are released from custody and supervision; under the Act, however, sexual offenders — regardless of the type and seriousness of offense — are never free from supervision, suspicion, scorn, and even, in a sense, officially-sanctioned harassment.

Once the public is put on notice of the supposedly dangerous individual and his whereabouts, the damage is done. "Notification puts the registrant's livelihood, domestic tranquility, and personal relationship with all around him in grave jeopardy." *E.B. v. Verniero*, 119 F.3d 1077, 1107 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1039 (1998); *see also Doe v. Pataki*, 120 F.3d 1263, 1284 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998) ("The released sex offender living in a small community might well become a pariah. . . ."). That is why the New Jersey Supreme Court in *Doe v. Poritz*, 662 A.2d 367, 421 (N.J. 1996), and the District Court below properly concluded that the stigma, possibility

of harm, and damage to one's reputation and livelihood from disclosure under the Act pose a sufficient threat of intrusion on protected interests that a due process hearing must occur before public notification may occur, so that the accuracy of the disclosure and the need for it can be filtered through a judicial check while also giving the registrant a chance to object and respond. *Cf. Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (city's disclosure of home addresses of police officers to persons likely to seek revenge implicated a constitutionally protected liberty interest).

Furthermore, the Act's alteration of registrants' legal status, when combined with the stigma concomitant to placement on the Registry and/or public release of Registry information, should trigger the protections of the "stigma plus" test of *Paul v. Davis*, 424 U.S. 693, 708-09, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). *See Doe v. Pataki*, 3 F. Supp. 2d 456, 467-68 (S.D.N.Y. 1998) ("In light of these requirements placed on registrants, there can be no genuine dispute that registration alters the legal status of all convicted sex offenders subject to the Act for a minimum of ten years and, for some, permanently. These requirements obviously encroach on the liberty of convicted sex offenders, and therefore, they suffer a tangible impairment of a right in addition to mere harm to reputation."). By altering the legal status of previously-convicted sex offenders from the status they would have otherwise had simply as released offenders who have completed their sentences — by subjecting this class of offenders to added reporting requirements and new criminal liability not threatened against other classes of offenders, by the constant monitoring of offenders' whereabouts, employment, aliases, and appearance; and by the threat of unknown publication of Registry information by law enforcement at any time to anyone — without due process of law, the Act runs afoul of the Fourteenth Amendment.

Third, Petitioner has a right to pursue gainful employment that is affected by the Act. *See Board of Regents v. Roth*, 408 U.S. 564, 573-74, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Lange-Kessler v. Department of Education of the State of New York*, 109 F.3d 137, 140 (2d Cir. 1997). As discussed immediately above, the release of information to employers, as contemplated by the legislature (R. 22, Def.'s Add. at 57; J.A.1, at 105) and as allowed by the text of the Act, will greatly interfere with Petitioner's right to seek and gain employment. As the District Court stated, "[t]here is no question that prospective employers would not want to hire someone they thought posed a danger to society, thereby effectively foreclosing employment opportunities . . ." (R. 56, Mem. of Ct. at 8; J.A.2, at 569.) If the Act is not intended to and will not affect an offender's employment (either by casting him in an unfavorable light to employers and customers or making him susceptible to added monitoring and even reproach at his job), then why is employment information contained in the Registry *and* made subject to public disclosure?

Fourth, Petitioner should have a federally-protected privacy interest in the nondisclosure of personal matters and information gathered by the state that was not public information prior to the Act and in being free from state intrusions into his privacy. *See U.S. Dep't of Justice v. Reporter's Comm'n for Freedom of the Press*, 489 U.S. 749, 767, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989); *see also Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999) (finding a privacy interest in the nondisclosure of one's home address but finding state's interest in disclosing the address to be compelling). Here important non-public and personal information is affirmatively disclosed by the police; information is not simply made available to interested citizens who pursue a valid request for information. But for the disclosure of Registry information, the community would have no statutory right to find out an offender's home or

work address after the offender's release or to current photographs, name and alias information, nor driver's license or Social Security number information if the offender had been paroled. *See Abernathy v. Whitley*, 838 S.W.2d 211, 214 (Tenn. Ct. App. 1992) (noting that there is "no generally recognized state or federal constitutional right of access to public records); *see also Whalen v. Roe*, 429 U.S. 589, 598-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). Also but for the Act, the public would have to initiate and pursue any requests for information (presumably based on some specific reason or fear) subject to the protections provided by the state administrative rules and regulations. With passage of the Act, Petitioner's personal information may now be disseminated widely within a community by the police acting in their sole and unchecked discretion to determine who should be given registrant information.[6] Through such dissemination, the Act does away with Petitioner's "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting), and his right to be free of unwarranted state intrusions into his privacy, *U.S. Dep't of Justice v. Reporter's Comm'n for Freedom of the Press*, 489 U.S. 749, 767, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989).

Importantly, the Sixth Circuit's majority opinion in this case conflicts with a prior decision of the Sixth Circuit in which the court held that disclosure of personal and family information of police officers "encroached on [the officers']

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6. Petitioner's state privacy interests are likely broader than those guaranteed by the federal constitution and should be given even greater protection. *See Campbell v. Sundquist*, 926 S.W.2d 250, 261 (Tenn. Ct. App. 1996). As acknowledged by the majority of the panel in the Sixth Circuit, the Tennessee Supreme Court has not addressed the question of whether the Act infringes on state privacy rights. Nevertheless, the Sixth Circuit speculated that the state supreme court would not find a protected interest implicated by the Act, rather than having certified the question to the state court as Petitioner had requested.

fundamental rights to privacy and personal security under the Due Process Clause of the Fourteenth Amendment." *See Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (city's disclosure of home addresses of police officers to persons likely to seek revenge implicated a constitutionally protected liberty interest). Thus, the Sixth Circuit has already established that persons have a protected interest in personal information, where the disclosure of such information may cause intrusions on personal security. Given the undisputed record of numerous acts of physical harm directed at registrants and their families, there can be no serious dispute that disclosure of personal registrant information subjects registrants to intrusions into their personal security that should give rise to due process protection. *See Doe v. Pataki*, 940 F. Supp. 603, 608-11 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 120 F.3d 1263 (2d Cir. 1997) (detailing numerous incidents of vigilantism, at times on persons of mistaken identity, after the public was notified of offenders in their localities); *see also* James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 Yale L.J. 1055, 1088 n.151 and accompanying text (1998).

Finally, as shown by statements in the legislative history, the Act was intended to interfere with Petitioner's constitutional right to travel freely between the states. *See* U.S. Const., art. IV, § 2; *Attorney General v. Soto-Lopez*, 476 U.S. 898, 903, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986).

In sum, application of the Act to Petitioner significantly intrudes on important interests of Petitioner, and Petitioner requests that the Court grant this Petition to consider whether these interests should be protected interests under the Due Process Clause. Federal law requires an opportunity to be heard when, for example, an automobile is seized by the government, *e.g.*, *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1356-57 (5th Cir. 1972); *Jaekel*

v. United States, 304 F. Supp. 993, 998-99 (S.D.N.Y. 1969), yet in this case the State of Tennessee imposes lifelong registration and monitoring burdens on previously-punished offenders and allows law enforcement officials wide discretion to publicize stigmatizing information about these persons without so much as a parole officer's opinion that the person poses any future threat or a letter to the registrant giving notice of the release of information. Surely a person's family, friend, and business relations, and his personal and familial safety, as well as even his reputation, are deserving of at least as much protection as a 1961 Chevrolet Impala receives. *See One 1961 Red Chevrolet Impala Sedan*, 457 F.2d at 1356-57; *see generally United States v. Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993) (due process clause requires pre-seizure notice and meaningful opportunity to be heard except in extraordinary circumstances).

CONCLUSION

As of the present date, all fifty states have adopted some form of sex offender registration and monitoring act, the great majority of which apply retroactively and involve public release of registry information. *See* Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 Am. Crim. L. Rev. 333, App. 1 (1998). The Tennessee Act and similar other acts raise foundational issues of federal law regarding the manner in which the regulation of undesirable conduct may be balanced against the punishment of past offenses and about the types of personal interests and rights that government may infringe without providing even minimal due process protections. For the reasons stated above, Petitioner requests that this Petition be granted so that these important issues of federal law may be considered.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED OCTOBER 4, 1999

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 97-6276/6321

ARTHUR CUTSHALL,

Plaintiff-Appellee/
Cross-Appellant,

v.

DON SUNDQUIST, Governor of the
State of Tennessee,

Defendant-Appellant/
Cross-Appellee.

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 95-00380 — Thomas A. Wiseman, Jr., District Judge.

Argued: November 5, 1998

Decided and Filed: October 4, 1999

Before: JONES, RYAN, and BATCHELDER,
Circuit Judges.

* * *

Appendix A

OPINION

RYAN, Circuit Judge. The plaintiff, Arthur Cutshall, challenges the constitutionality of the Tennessee Sex Offender Registration and Monitoring Act. TENN. CODE §§ 40-39-101 to -108 (1994). The Act requires sex offenders to register with law enforcement agencies, and allows law enforcement officials to release registry information when necessary to protect the public. Cutshall is subject to the Act because of a 1990 Tennessee conviction for aggravated sexual battery. He challenges both the registration and the notification aspects of the law. While the district court concluded that the registration provision of the Act does not violate the United States Constitution, it agreed with Cutshall that any release of registry information would violate his constitutional rights unless he is given notice and an opportunity to be heard. Therefore, the court granted summary judgment in part for the defendant and in part for the plaintiff. Both sides appealed.

We are asked to decide whether the Act violates the United States Constitution, specifically, the Double Jeopardy, *Ex Post Facto*, Bill of Attainder, Due Process, or Equal Protection Clauses; the Eighth Amendment; the constitutional right to travel interstate; and the constitutional right to privacy. We must also decide whether the Act violates the plaintiff's right to privacy under the Tennessee state constitution. We will reverse in part and affirm in part.

Appendix A

I.

In 1994, Congress enacted, and the President signed into law, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program. 42 U.S.C. § 14071. Under this legislation, the Attorney General of the United States was required to establish guidelines for state programs requiring persons convicted of crimes against minors or crimes of sexual violence to register a current address with state law enforcement officials. 42 U.S.C. § 14071(a)(1)(A). The federal law provides:

> The information collected under a State registration program shall be treated as private data except that —
>
> **(1)** such information may be disclosed to law enforcement agencies for law enforcement purposes;
>
> **(2)** such information may be disclosed to government agencies conducting confidential background checks; and
>
> **(3)** the designated State law enforcement agency and any local law enforcement agency authorized by the State agency *may release relevant information that is necessary to protect the public concerning a specific person required to register under this section*, except that the identity of a victim of an offense that requires registration under this section shall not be released.

42 U.S.C. § 14071(d) (1994) (emphasis added). Under the federal law, the states were given three years from September 1, 1994, within which to comply. *See* 42 U.S.C. § 14071(f)(1) (1994). Failure to implement a registration program would result in the loss of some federal funding. *See* 42 U.S.C. § 14071(f)(2)(A) (1994).

Congress amended the federal law in 1996 to provide that the registry information *may* be disclosed for any permissible state law purpose, and that information *shall* be released when necessary to protect the public. Further, the reference indicating that registry information was considered private was removed. *See* 42 U.S.C. § 14071(d) (amended 1996).

In 1994, the Tennessee legislature adopted its own Sexual Offender Registration and Monitoring Act. TENN. CODE § 40-39-101 to -108. Although the Act has been amended since the inception of this lawsuit, the 1994 enactment provided for registration with the Tennessee Bureau of Investigation (TBI) as follows:

> Within ten (10) days following release on probation, parole, or any other alternative to incarceration; within ten (10) days following discharge from incarceration without supervision; within ten (10) days following any change of residence; and within ten (10) days after coming into a municipality or county in which the sexual offender temporarily resides or is domiciled for such length of time; each sexual offender shall complete a TBI sexual offender registration/

monitoring form and shall cause such form to be delivered to TBI headquarters in Nashville. Sexual offender registration/monitoring forms shall require disclosure of the following information:

(1) Complete name as well as any alias;

(2) Date and place of birth;

(3) Social security number;

(4) State of issuance and identification number of any valid driver license;

(5) For a sexual offender on supervised release, the name, address, and telephone number of the registrant's parole officer, probation officer, or other person responsible for the registrant's supervision;

(6) Sexual offense or offenses of which the registrant has been convicted;

(7) Current place and length of employment;

(8) Current address and length of residence at such address; and

(9) Such other registration and/or monitoring information as may be required by rules promulgated by the TBI in accordance with the

provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

TENN. CODE § 40-39-103 (1994).

The Act also provided for the maintenance of a registry and for the release of registry information:

> (a) Using information received or collected pursuant to this chapter, the TBI shall establish, maintain, and update a centralized record system of sexual offender registration and verification information. The TBI shall promptly report current sexual offender registration and verification information to:
>
> (1) The local law enforcement agency for the offender's place of residence;
>
> (2) The local law enforcement agency for the offender's previous place of residence if a change of residence is indicated;
>
> (3) The local law enforcement agency for the offender's place of employment;
>
> (4) The local law enforcement agency for the offender's previous place of employment if a change of employment is indicated;
>
> (5) When applicable, the probation officer, parole officer, or other public officer or employee

assigned responsibility for the offender's supervised release; and

(6) The identification division of the federal bureau of investigation.

(b) Upon request of the TBI, a local law enforcement agency, probation officer, parole officer, or other public officer or employee assigned responsibility for the offender's supervised release, shall assist in the investigation and apprehension of a sexual offender suspected of violating the provisions of this chapter.

(c) Except as otherwise provided in subsections (a) and (b), information reported on sexual offender registration/monitoring forms, verification/monitoring forms, and acknowledgment forms shall be confidential; provided, that *the TBI or a local law enforcement agency may release relevant information deemed necessary to protect the public concerning a specific sexual offender who is required to register pursuant to this chapter.*

TENN. CODE. § 40-39-106 (1994) (emphasis added).

II.

We review a district court's grant of summary judgment *de novo. See Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 335 (1997).

Appendix A

III.

A.

Before we reach the merits of the parties' arguments, we must address the state's contention that the district court lacked subject-matter jurisdiction. Tennessee claims that, as to the notification provision of the Act, there is no case or controversy as required by Article III of the United States Constitution. Specifically, the state claims that Cutshall has failed to allege any imminent threat of harm because there is no evidence that the state is likely to disclose his sex offender registry information to the public. Relatedly, the state argues that Cutshall lacks standing because his claim of injury is mere speculation. Finally, the state claims that the injuries Cutshall alleges stem from the potential misuse of registry information by the public, and cannot be traced to the state.

We do not agree.

> The irreducible constitutional minimum of standing contains three requirements. First, and foremost, there must be alleged (and ultimately proven) an injury in fact — a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. Second, there must be causation — a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability — a likelihood that the requested relief will redress

> the alleged injury. This triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.

Steel Company v. Citizens for a Better Env't, 523 U.S. 83, __, 118 S. Ct. 1003, 1016-17 (1998) (internal quotation marks, citations, and footnote omitted.)

Beginning with the third element, it is clear, and the parties do not dispute, that the relief sought will redress Cutshall's alleged injuries. Should this court agree with Cutshall's claims, we have the power to grant relief that would prevent the state from disclosing his registry information entirely, thus eliminating his alleged injury.

Turning to the second element, Cutshall has also satisfied this court that the alleged injuries are traceable to the state of Tennessee. To satisfy this requirement, Cutshall need not have a valid claim, only an arguable one. "[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Id.* at 1010. Cutshall has argued, *inter alia*, that releasing the registry information operates as an impermissible imposition of punishment. Because it is the state that controls the release of the information, the alleged injuries are causally connected to the state's conduct. We need not agree, as a threshold matter, that the Act imposes a punishment. For Article III purposes, we need only determine that Cutshall has an arguable claim of injuries traceable to the state. We think he has just such a claim.

The first element for standing requires injury in fact, and the state claims that without any clear indication that Cutshall's registry information is about to be released, he has suffered no such injury. However, the statute is written in such a manner that the release of registry information can take place at any time law enforcement officials have determined that release is necessary to protect the public. Therefore, we think Cutshall has satisfied this requirement as well. Were it otherwise, a convicted sex offender would be required to wait until after his registry information is released before challenging the Act. Cutshall's status as a convicted sex offender registered in accordance with the Act arguably results in an injury because he faces a specific threat of being subject to the release of registry information every day. Cutshall's claims are more than general complaints about the conduct of the Tennessee government. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983).

Therefore, we conclude Cutshall has met the minimum standing requirements to satisfy Article III of the Constitution.

B.

We turn now to the constitutionality of the Act.

1.

a.

Cutshall argues that the Act punishes him twice for the same offense, in violation of the Double Jeopardy Clause of

the Fifth Amendment to the United States Constitution. He argues that the Tennessee legislature's purpose in enacting the law was to punish convicted sex offenders and that the Act effectively does so.

First, Cutshall points out that in discussing the Act, some members of the Tennessee legislature made comments indicating that the purpose of the Act was to punish and deter sex offenders and to discourage them from residing in Tennessee. Cutshall argues that lifelong monitoring is a form of punishment. Moreover, he argues, placement of the Act in the Tennessee Criminal Code indicates its punitive nature. Cutshall claims that requiring all sex offenders to register for a period of 10 years is arbitrary, capricious, and excessive, further indicating that the legislation is not a valid regulatory or remedial measure. Cutshall claims that the Tennessee legislature passed the Act in order to punish, and that this intent should end the inquiry.

Second, Cutshall argues that the Act has punitive effects. He claims the Act imposes an affirmative disability on all sex offenders because they must continually update their registry information and respond to requests for information from the TBI under penalty of law.

Cutshall also argues that any release of registry information imposes a punishment. He claims that public disclosure does not serve the state's alleged purpose of aiding law enforcement. According to Cutshall, public disclosure subjects sex offenders to stigmatization, ridicule, and harassment. He submits that the shaming effect of public disclosure has traditionally been viewed as punishment.

The state of Tennessee, on the other hand, claims that the legislature promulgated the Act to assist law enforcement in solving crimes and to help the public protect itself. Moreover, the state claims that Tennessee passed the law in response to an act of the United States Congress which required the several states to establish sex offender registries or lose certain federal funding. The state submits that the Act does not operate to punish registrants because it in no way seeks to limit their actions, and registering requires little effort and inconvenience.

b.

The Double Jeopardy Clause of the Fifth Amendment provides in relevant part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Fifth Amendment applies to the states through the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784, 794-95 (1969).

> [T]he Double Jeopardy Clause does not prohibit the imposition of *any* additional sanction that could, in common parlance, be described as punishment. The Clause protects only against the imposition of multiple *criminal* punishments for the same offense, . . . and then only when such occurs in successive proceedings.

Hudson v. United States, 522 U.S. 93, __, 118 S. Ct. 488, 493 (1997) (some emphasis added) (internal quotation marks and citations omitted).

Appendix A

In *Hudson*, the most recent Supreme Court decision addressing whether a statutory scheme imposes punishment for double jeopardy purposes, the Court advanced a two-part inquiry:

> A court must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Even in those cases where the legislature has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect . . . as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty.

Id. (internal quotation marks and citations omitted).

In evaluating the second part of this analysis, the Court counseled in favor of the factors previously articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963):

> [(1) w]hether the sanction involves an affirmative disability or restraint, [(2)] whether it has historically been regarded as a punishment, [(3)] whether it comes into play only on a finding of scienter, [(4)] whether its operation will promote the traditional aims of punishment — retribution and deterrence, [(5)] whether the behavior to which it applies is already a crime, [(6)] whether an alternative purpose to which it may rationally be connected is assignable for it, [and (7)] whether

> it appears excessive in relation to the alternative purpose assigned. . . . [It is important to note, however, that] these factors must be considered in relation to the statute on its face.

Id. at 168-69 (internal quotation marks, citations, and footnotes omitted).

In *Hudson*, the Supreme Court retreated somewhat from its decision in *United States v. Halper*, 490 U.S. 435 (1989), abrogated by *Hudson v. United States*, 522 U.S. 93, in favor of its earlier decision in *United States v. Ward*, 448 U.S. 242 (1980). According to the *Hudson* Court, *Halper* improperly skipped the first step in the analysis, and focused on whether the sanction was so grossly disproportionate to the harm caused so as to constitute punishment. *Hudson*, 118 S. Ct. at 494. Also, *Halper* failed to recognize that all civil penalties serve as a deterrent. *See id.* In backing away from *Halper*, the Court voiced a concern "about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*," including *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1039 (1998), a challenge to New Jersey's sex offender registration law as violative of double jeopardy. *Hudson*, 118 S. Ct. at 493 & n.4.

c.

We begin by examining the Act's purpose. The Act has been amended since the inception of this lawsuit, but as enacted, it contained no express statement of purpose. Although it is placed in title 40 of the Tennessee Code, the section devoted to criminal procedure, its location within

criminal procedure laws does not necessarily indicate an intent on the part of the legislature to punish sex offenders. The Supreme Court has repeatedly approved of civil forfeitures after criminal prosecutions, even when the statute authorizing forfeiture is located in the same statute as the criminal offense. *See, e.g., United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). We think the location of Tennessee's sex offender law does not assist us in determining whether the Act was intended to serve as punishment.

In examining the purpose of the statute, we look primarily to its language. As enacted, it contained six substantive sections, dealing with the content of registry information, verification of registry information, formalities of registry forms, record keeping and reporting of registry information, potential for removal from the registry, and penalties for violating the registration requirements. Noticeably absent in this statutory scheme is an indication that the legislature intended for the Act to have other than a regulatory purpose. The reporting provisions themselves merely require registrants to supply basic information; the burdens imposed are minor, involving only the completion of the appropriate forms. The language of the Act evidences an intent on the part of the legislature to monitor the whereabouts of convicted sex offenders. Moreover, the authority of law enforcement agencies to disclose registry information is limited to situations in which disclosure is necessary to protect the public. This, we think, is further indication that the legislature did not intend for the Act to be punitive. In sum, we find no indication that the Tennessee legislature intended the Act to be a punitive measure.

Finding no punitive purpose evident from the language of the Act, we are required nevertheless to determine whether, in its effect, the Act is punitive in the sense that it twice punishes a registrant for the same offense. In examining the effects of the law, the factors articulated by the Supreme Court in *Kennedy*, 372 U.S. 144, we discussed earlier, "provide useful guideposts." *Hudson*, 118 S. Ct. at 493. However, these factors must be considered in light of the statute on its face, and "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (internal quotation marks and citation omitted).

The first *Kennedy* factor, an affirmative disability or restraint, "is some sanction approaching the infamous punishment of imprisonment." *Herbert v. Billy*, 160 F.3d 1131, 1137 (6th Cir. 1998) (internal quotation marks and citations omitted). In *Hudson*, the Supreme Court concluded that indefinite debarment from the banking industry did not rise to an affirmative disability or restraint. *Hudson*, 118 S. Ct. at 496. This court, in *Herbert*, concluded that driver's license suspension for driving under the influence did not impose an affirmative disability. *Herbert*, 160 F.3d at 1137. Similarly, the Tennessee Act does not impose an affirmative disability or restraint. In fact, the burdens imposed on sex offenders are less onerous than those imposed in *Hudson* and *Herbert*, loss of livelihood and loss of driver's license. Cutshall need only notify the TBI where he lives, where he works, and other basic data. He is free to live where he chooses, come and go as he pleases, and seek any employment he wishes. Neither are the public notification provisions tantamount to imprisonment. Under the Act, law

enforcement officials may disclose registry information when necessary to protect the public. This imposes no restraint whatever upon the activities of a registrant.

The second *Kennedy* factor asks whether, from a historical perspective, the sanction has been viewed as punishment. Historically, punishment has taken the forms of incarceration, incapacitation, and rehabilitation. Nothing in the Tennessee Act imposes restrictions on the conduct of sex offenders that are akin to incarceration or incapacitation; nor does the Act force registrants to conform their actions in the way that rehabilitative efforts might. The Act keeps law enforcement officials informed of the location of convicted sex offenders, and, when necessary, the public can be notified of sex offenders who pose a particular risk. The focus of the Act is not on circumscribing the conduct of the offender, but on the protection of the public. The Act provides for the collection and dissemination of information; Cutshall has not cited, and we have not found, any evidence that dissemination of information has historically been considered punishment. We are mindful of the fact that shaming punishments, such as banishment and pillory, have historically been used to punish criminals. However, these practices involved more than the mere dissemination of information. Moreover, the possibility of a shaming effect from disclosure of registry information is certainly not the clearest of proof necessary to overcome the legislative intent that the Act serve regulatory and not punitive purposes. Dissemination of information is fundamentally different from traditional forms of punishment, and we conclude that it has not been viewed as punishment from a historical perspective.

The third factor requires that we consider whether the Act is triggered only upon a finding of scienter. "The term 'scienter' means 'knowingly' and is used to signify a defendant's guilty knowledge." *Herbert*, 160 F.3d at 1137-38. The Supreme Court concluded, in *Hudson*, that the law authorizing debarment from the banking industry did not come into play "only" upon a finding of scienter where the law applied to "any person 'who violates' any of the underlying banking statutes, without regard to the violator's state of mind." *Hudson*, 118 S. Ct. at 496. The Court did not specifically examine the state of mind requirements of the underlying banking statutes, and instead looked to the debarment statute "on its face." *Id.* Similar to the debarment statute in *Hudson*, the Tennessee Act applies to persons convicted of any one of the sex offenses listed in the statute, without inquiry into the offender's state of mind. Although it is not clear that we are required to examine the state of mind requirements of the underlying sexual offenses, an examination of the offenses leads to the same conclusion. Some of the listed offenses do not clearly specify a culpable *mens rea*. *See, e.g.*, TENN. CODE § 39-13-506 (statutory rape). The Tennessee Code specifies, and Tennessee courts have held, that "when a statute omits reference to a specific *mens rea*, but does not plainly dispense with a *mens rea* requirement, then proof of 'intent,' 'knowledge,' or 'recklessness' will suffice to establish a culpable mental state." *State v. Hill*, 954 S.W.2d 725, 726 (Tenn. 1997) (citing TENN. CODE § 39-11-301(c)). Thus, in view of the language of the Act and the relevant underlying offenses, we conclude that the Act does not come into play "only" on a finding of scienter.

Appendix A

In examining the fourth *Kennedy* factor, it is clear that the Act will serve to promote deterrence. Certainly, once a sex offender has informed the local law enforcement agency of his address and place of employment, knowing that law enforcement officials have that information will likely operate as a deterrent. However, the Supreme Court in *Hudson*, cautioned: "To hold that the mere presence of a deterrent purpose renders . . . sanctions 'criminal' for double jeopardy purposes would severely undermine the Government's ability to engage in effective regulation . . . ." *Hudson*, 118 S. Ct. at 496. Thus, satisfaction of this factor is not dispositive, but it does weigh in Cutshall's favor.

The fifth *Kennedy* factor asks whether the behavior to which the statute applies is already a crime. The Act unarguably applies only to convicted sex offenders. In *Herbert*, this court addressed an Ohio law authorizing license suspension for driving under the influence, a sanction imposed in addition to criminal prosecution for drunk driving. The court recognized that the "statutory scheme . . . intertwine[d] the license suspension with the arrest for drunken driving," but concluded that this was insufficient to find license suspension punitive for double jeopardy purposes. *Herbert*, 160 F.3d at 1138. Similarly, although the registration and notification provisions are intertwined with the offender's underlying conviction, they impose no additional penalty akin to revocation of license or loss of livelihood. We decline to hold that these requirements transform the Act from one that is regulatory to one that is punitive.

The final two factors under the *Kennedy* analysis require us to decide whether there is a remedial purpose behind the Act and if so, whether the Act is excessive in relation to the remedial purpose. As we have said, the Act serves to aid law enforcement and protect the public. Congress, and the legislatures of the several states, have considered the egregiousness of sexual crimes, particularly where children are concerned, and studies have indicated that sexual offenders have high rates of recidivism. We are also mindful of the burdens the Act imposes on convicted sex offenders. However, many of these alleged burdens stem not from the Act itself, but from the potential abuse of registry information by the public. Given the gravity of the state's interest in protecting the public from recidivist sex offenders, and the small burdens imposed on registrants, we cannot say that the requirements of the Act exceed its remedial purpose.

The state of Tennessee has alerted us to the purpose statement adopted by the Tennessee legislature in 1997, after the commencement of this litigation. *See* TENN. CODE § 40-39-101 (1997). It is not impossible that this purpose clause was a *post hoc* effort to clarify the legislature's intent in enacting the original statute. As a result, we will disregard this purpose statement entirely.

Examining the statute in light of each of the *Kennedy* factors, we conclude that the Act does not violate the prohibition against double jeopardy.

2.

Cutshall also argues that the Act violates the *Ex Post Facto* Clause of the federal Constitution. The clause provides: "No state shall . . . pass any . . . ex post facto Law." U.S. CONST. art. I, § 10, cl. 1. "To fall within the *ex post facto* prohibition, a law must be retrospective — that is it must apply to events occurring before its enactment — and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (internal quotation marks and citation omitted). The clause is designed to protect against legislative abuses and to provide fair notice of the consequences of criminal actions. *See Miller v. Florida*, 482 U.S. 423, 429-30 (1987).

The parties do not dispute that the Act was passed after Cutshall committed his sexual offense. They also agree that the Act purports to apply to those convicted of sex offenses prior to its enactment. Therefore, we need only address the second element of the *ex post facto* analysis: whether the Act impermissibly disadvantages sex offenders, by altering the definition of criminal conduct or increasing the onerousness of the punishment for crimes committed before their enactment.

The Supreme Court, although not expressly adopting the *Kennedy* factors, recently applied many of the same factors in deciding an *ex post facto* challenge in another context. *See Kansas v. Hendricks*, 521 U.S. 346, 360-69 (1997). *Hendricks* involved a constitutional challenge to a civil commitment statute, Kansas's Sexually Violent Predator Act.

See id. at 2076. The Court conducted a single analysis, determined that the law at issue was not punitive, and concluded that the law could not violate either the double jeopardy prohibition or the ban on *ex post facto* laws. *See id.* at 2081-85.

In light of the analysis in *Hendricks*, we are persuaded that the intent-effects analysis we have discussed in the double jeopardy context applies as well for determining whether the *Ex Post Facto Clause* is implicated by the Act. Using this approach, we conclude, once again, that the Act was not intended to punish, and its requirements do not transform the law into punishment. Because the Act imposes no punishment, the *Ex Post Facto* Clause is not implicated.

3.

A third challenge Cutshall lodges against the Act is that it violates the constitutional bar against bills of attainder. The Bill of Attainder Clause, U.S. CONST. art. I, § 9, cl. 3, prohibits legislatures from engaging in "[l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States v. Brown*, 381 U.S. 437, 448-49 (1965). In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the Supreme Court considered the definition of punishment in the bill of attainder context. The Court announced a three-prong test for determining whether the law in question imposed a punishment. The Court considered, first, punishments that historically would have been viewed as violative of the bill of attainder prohibition: "imprisonment,

banishment, . . . the punitive confiscation of property by the sovereign," and "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations." *Id.* at 474 (footnotes omitted). Second, the Court considered whether, in light of the severity of the burdens imposed, the challenged law served legitimate nonpunitive purposes. *See id.* at 475-76. Third, the Court examined whether the legislature intended the law to serve as punishment. *See id.* at 478 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144). These three considerations were applied again in *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984).

It is self-evident, we think, that the Tennessee Act did not, in light of these considerations, violate the Bill of Attainder Clause. Gathering and possibly disseminating information is not one of the traditional forms of punishment. And, as we have made clear, the Act serves legitimate regulatory purposes and was not intended to serve as punishment.

4.

Cutshall argues that the Act violates the Eighth Amendment's prohibition of cruel and unusual punishment. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

We have already concluded that the Act does not impose punishment; it is regulatory in nature. Therefore, it does not violate the Eighth Amendment's prohibition on cruel and unusual punishment.

5.

Cutshall also claims the Act violates his constitutional right to interstate travel. He bases this argument on statements in the legislative history of the Act indicating that a sex offender registry would encourage sex offenders to flee Tennessee in search of states with no such registry.

This argument must fail. "The cases applying the right to travel doctrine involve laws which distinguished between newcomers to a state, who were denied fundamental rights, and residents of longer duration, who were accorded such rights." *Salibra v. Supreme Court of Ohio*, 730 F.2d 1059, 1064-65 (6th Cir. 1984). The Tennessee Act applies to all sex offenders residing in Tennessee regardless of where they were convicted. The Act contains no duration of residency restriction. Moreover, now that all 50 states have adopted sex offender registries, *see* Stacey Hiller, Note, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. PUB. INT. L.J. 271, 276 & n.36 (1998), Tennessee is no more or less attractive than any other state for a sex offender seeking a place to reside in total anonymity.

6.

Cutshall also challenges the Act on procedural due process grounds. He claims the Act deprives him of alleged constitutional rights of privacy and employment, and the right to be free from stigma, without due process of law. Specifically, Cutshall claims that the Act infringes his protected liberty interests because it imposes punishment,

subjects him to stigmatization and loss of employment, infringes his right to pursue employment, and violates his state and federal right to privacy by disclosing private matters.

The district court agreed with Cutshall that the provision of the Act allowing for *public disclosure* of registry information violated these rights, and concluded that Tennessee was required to provide Cutshall with appropriate procedural due process protections before releasing any registry information. On the other hand, the district court concluded that no constitutionally protected interest was implicated by the *registration provision*.

"The Fourteenth Amendment prohibits state actors from depriving an individual of life, liberty, or property without due process of law." *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 140-41 (6th Cir. 1997). Absent state interference with a protected property or liberty interest, Cutshall is entitled to no pre-deprivation process whatsoever. *See id.* at 141.

> [A] property interest exists and its boundaries are defined by "rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Id. (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Therefore, to establish a protected interest in either freedom from having to register or freedom

from public disclosure of registry information, Cutshall must be able to point to a right conferred by state law or the Constitution that supports his contention.

We will address each of Cutshall's arguments in turn. First, "[i]t is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). However, the Tennessee Act involves no physical restraint, and we have concluded that it imposes no punishment. Therefore, we reject Cutshall's first due process argument and hold that the Act does not implicate Cutshall's liberty interest in being free from punishment without due process of law.

Cutshall's claim that the Act violates his Fourteenth Amendment rights because it imposes a stigma and deprives him of employment and privacy is likewise without merit. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Supreme Court addressed the constitutionality of a Wisconsin law authorizing the posting of names of individuals to whom intoxicating liquors should not be sold. The Court stated: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.* at 437. The Supreme Court made clear in a later case, however, that reputation alone is not a constitutionally protected liberty or property interest. *See Paul v. Davis*, 424 U.S. 693, 701 (1976). Only where the stigma of damage to a reputation is coupled with another interest, such as employment, is procedural due process protection triggered. In reviewing its decisions, the Supreme Court stated that "the Court has

never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of *government* employment." *Id.* at 706 (emphasis added). The Due Process Clause is implicated only when state conduct alters "a right or status previously recognized by state law." *Id.* at 711. This has come to be known as the "stigma-plus" test. *See, e.g., Levin v. Childers*, 101 F.3d 44, 46 (6th Cir. 1996).

To succeed in establishing a protected liberty interest, a plaintiff must show that the "governmental action taken . . . deprived the individual of a right previously held under state law." *Paul*, 424 U.S. at 708. In *Naegele Outdoor Advertising Co. v. Moulton*, 773 F.2d 692, 701 (6th Cir. 1985), this court observed that loss of government employment, or loss of the right to purchase alcohol, met the "plus" portion of the stigma-plus test under previous Supreme Court decisions. Cutshall claims that loss of employment and violation of his privacy rights satisfy the "plus" requirement in his case.

We examine, first, Cutshall's claim that the Act deprives him of his claimed right to employment." A charge that merely makes a plaintiff less attractive to other employers but leaves open a definite range of opportunity does not constitute a liberty deprivation." *Gregory v. Hunt*, 24 F.3d 781, 788 (6th Cir. 1994) (internal quotation marks and citation omitted). In this case, the Act does not limit the ability of registrants to seek and obtain any type of employment. In *Dean v. McWherter*, 70 F.3d 43 (6th Cir. 1995), the plaintiffs challenged a Tennessee law that labeled sex offenders as "mentally ill." The plaintiffs claimed that

the law violated the Due Process Clause because it stigmatized them and diminished their future employment opportunities. This court rejected the challenge, noting that the plaintiffs failed to establish that the labeling adversely impacted their employment opportunities. "[P]laintiffs' future employment opportunities depend on independent, medical mental health evaluations and on the willingness of employers to hire convicted sex offenders, not on the [law at issue]." *Id.* at 46.

Courts recognizing a constitutionally protected right to employment have done so in very limited circumstances and have dealt with terminations of government employment where either state law or an agreement between the parties purports to limit the ability of the government to terminate the employment. Cutshall has not cited, and we have not found, any case recognizing a general right to private employment. *Greene v. McElroy*, 360 U.S. 474 (1959), and *Joelson v. United States*, 86 F.3d 1413 (6th Cir. 1996), relied on by the district court, involved government employment and do not support the district court's conclusion that the Act implicates a constitutionally protected liberty or property interest in employment.

The Act in no way infringes upon Cutshall's ability to seek, obtain, and maintain a job. Cutshall does not contend, quite correctly, that the Act prevents him from obtaining government employment. Therefore, we hold that the Act does not implicate a constitutionally protected liberty or property interest in employment.

We turn now to Cutshall's right to privacy claim under the federal Constitution. In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court acknowledged the existence of a privacy interest in decision making, and the possibility of an individual interest in avoiding disclosure of personal matters. However, to support the existence of a privacy interest in avoiding publication of personal matters, the Court cited only concurring and dissenting opinions. *See Whalen*, 429 U.S. at 599-600 & n.25. We find no authority in that case for the proposition that such an interest exists. At any rate, the *Whalen* Court concluded that the law at issue, which compiled data on patient prescriptions, did not implicate the alleged privacy interest in avoiding the disclosure of private matters. In the same vein, we are not persuaded that the Act infringes on any constitutionally protected privacy interest.

In *Paul*, 424 U.S. 693, the Court again addressed the right of privacy:

> While there is no right of privacy found in any specific guarantee of the Constitution, the Court has recognized that zones of privacy may be created by more specific constitutional guarantees and thereby impose limits upon government power. . . . [P]ersonal rights found in this guarantee of personal privacy must be limited to those which are fundamental or implicit in the concept of ordered liberty. . . . The activities detailed as being within this definition were . . . matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been

> held that there are limitations on the States' power to substantively regulate conduct.

Id. at 712-13 (internal quotation marks and citations omitted).

This court addressed a right of privacy claim in *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981). The case involved a challenge to an Ohio county's practice of compiling social histories on juvenile offenders. The social histories contained information about the incident, the juvenile, his family, school records, and anything else that the probation officer deemed relevant. *See id.* at 1082-83. The social history was given to the court and made "available to 55 different government, social and religious agencies that belong to a 'social services clearinghouse.' " *Id.* at 1082. The juvenile plaintiffs alleged that this practice violated their constitutional right of privacy. *See id.* at 1085. This court rejected the challenge, even in light of the language in *Whalen* indicating the possible existence of a right to nondisclosure of private matters:

> Absent a clear indication from the Supreme Court we will not construe isolated statements in *Whalen* . . . more broadly than their context allows to recognize a general constitutional right to have disclosure of private information measured against the need for disclosure. . . .
>
> . . . .
>
> . . . [W]e conclude that the Constitution does not encompass a general right to nondisclosure

> of private information. We agree with those courts that have restricted the right of privacy to its boundaries as established in *Paul v. Davis* . . . and *Roe v. Wade*, 410 U.S. [113 (1973),] . . . those personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty."

Id. at 1089-90 (citations omitted). This court concluded that release of juvenile social records did not violate any privacy right that was fundamental or implicit in the concept of ordered liberty. *See id.* at 1090.

In making its decision that Cutshall had a constitutional right to keep his registry information private, the district court relied heavily on *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). However, a careful analysis leads us to conclude that this case is not applicable to the issue before us. In *Reporters Committee*, the Supreme Court decided "whether the disclosure of the contents of [an FBI rap sheet] to a third party could reasonably be expected to constitute an unwarranted invasion of personal privacy *within the meaning of the Freedom of Information Act.*" *Id.* at 751 (emphasis added) (internal quotation marks and citation omitted). The Freedom of Information Act, 5 U.S.C. § 552, requires broad disclosure of documents. Records or information compiled for law enforcement are excepted from disclosure, " 'but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.' " Id. at 755-56 (quoting 5 U.S.C. § 522(b)(7)(C)). Although the Court made references to the possibility of a constitutional right to keep private matters

from being publicly disclosed, any reference made to this possible right was mere *dicta*. The only matter before the Court was a specific exception to FOIA; and after the *Reporters Committee* decision, this court has continued to maintain its position articulated in *J.P.* that there is no federal constitutional right of nondisclosure. *See Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994). Therefore, the district court's reliance on *Reporters Committee* was misplaced, and we conclude that Cutshall has no constitutional right to keep his registry information from being disclosed.

Given the Supreme Court's and this court's narrow view of the federal constitutional right of privacy, we reject Cutshall's claim that the Act infringes on this asserted right. The Constitution does not provide Cutshall with a right to keep his registry information private, and the Act does not impose any restrictions on his personal rights that are fundamental or implicit in the concept of ordered liberty, such as his procreative or marital rights.

Cutshall also claims a privacy interest derived from Tennessee law. The Supreme Court of Tennessee has concluded:

> Based on both the language and the development of our state constitution, we have no hesitation in drawing the conclusion that there is a right of individual privacy guaranteed under and protected by the liberty clauses of the Tennessee Declaration of Rights.

> Undoubtedly, that right to privacy incorporates some of the attributes of the federal constitutional right to privacy and, in any given fact situation, may also share some of its contours. . . . [H]owever, there is no reason to assume that there is complete congruency.

Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992). The specific individual freedom at stake in *Davis* was the right of procreation, and the court concluded that it was included in the individual's right of privacy. *See id.*

This court has recently been faced with the claim presented here — that the Tennessee constitution provides a right to be free from the public disclosure of private facts. This court declined to decide the matter out of "respect for the right of a state court system to construe that state's own constitution and . . . statute." *Doe v. Sundquist*, 106 F.3d 702, 708 (6th Cir.), *cert. denied*, 118 S. Ct. 51 (1997). That case involved a challenge to the recent legislation in Tennessee significantly broadening the availability of previously sealed adoption records. When the plaintiffs in that case brought their claims in Tennessee state court seeking injunctive relief, the Tennessee judge stated:

> *The Court finds the plaintiffs' argument that the right of privacy extends to nondisclosure of private information to be without merit.* The disclosure of private information is not entitled to constitutional protection. The right to privacy has more to do with the general "right to be let alone" and a protected sphere in which the

> government may not regulate conduct rather than some amorphous right protecting against the nondisclosure of private information.

Doe v. Sundquist, No. 97C-941, 1997 WL 354786, at *6 (Tenn. Cir. Ct. May 2, 1997) (emphasis added).

The Tennessee Court of Appeals has observed "that the right to privacy provided to Tennesseans under our Constitution is in fact more extensive than the corresponding right to privacy provided by the Federal Constitution." *Campbell v. Sundquist*, 926 S.W.2d 250, 261 (Tenn. Ct. App. 1996). However, that case dealt with the autonomy branch of privacy and did not address any right of nondisclosure. In that case, the court invalidated a Tennessee law which attempted to restrict consensual homosexual sex:

> We think it is consistent with this State's Constitution and constitutional jurisprudence to hold that an adult's right to engage in consensual and noncommercial sexual activities in the privacy of that adult's home is a matter of intimate personal concern which is at the heart of Tennessee's protection of the right to privacy, and that this right should not be diminished or afforded less constitutional protection when the adults engaging in that private activity are of the same gender.

Id. at 262. Cutshall has not cited, and we have not found, any case from a Tennessee court adopting a constitutional right to the nondisclosure of private matters.

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The Tennessee Supreme Court has not spoken on the issue of whether the Tennessee constitution provides a right of privacy encompassing a right to the nondisclosure of private matters. We have examined the Tennessee constitution and find no language suggesting a right of privacy of the kind Cutshall claims. Moreover, and what is more important, we have no reason to believe that the Tennessee Supreme Court would find such a right. Therefore, we hold that the Tennessee constitution does not provide a right to the nondisclosure of private facts.

Cutshall has failed to establish that the Act infringes any constitutionally protected liberty or property interests in employment or privacy. Without more, his claim that the Act damages his reputation must also fail. Without the "plus" factor of employment or privacy, Cutshall has failed to satisfy the stigma-plus test of *Paul*. Therefore, he is not entitled to any procedural protections under the Due Process Clause.

7.

Finally, Cutshall claims that the Act violates the Equal Protection Clause. The Equal Protection Clause provides that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Unless the legislation classification under attack involves a suspect class, the classification need only be rationally related to a legitimate government goal to survive constitutional challenge. *See Chapman v. United States*, 500 U.S. 453, 465 (1991). "[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440.

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Convicted sex offenders are not a suspect class. Therefore, the Act is subject to scrutiny under the rational basis test. Tennessee has established legitimate concerns about law enforcement and public safety with respect to sex offenses. Given the indications that sex offenders pose a particular threat of reoffending, we cannot say that the Act is irrational. Therefore, this claim must also fail. We hold that the Act does not violate Cutshall's right to equal protection of the laws.

C.

Tennessee also takes issue with the temporary injunction issued by the district court preventing the state from releasing sex offender registry data. Although not crystal clear from the proceedings below, we will assume, without deciding, that the injunction is still in effect.

This court reviews the decision to grant a preliminary injunction for an abuse of discretion. *See Glover v. Johnson*, 855 F.2d 277, 282 (6th Cir. 1988). In deciding whether a preliminary injunction was an abuse of discretion, this court considers the following four factors:

> (a) the likelihood of the success on the merits of the action,
>
> (b) the irreparable harm which could result without the relief requested,
>
> (c) the impact on the public interest, and
>
> (d) the possibility if substantial harm to others.

Id. Because, for all the reasons we have discussed at length, Cutshall has failed to persuade this court that his challenge would likely succeed on the merits, we find that the district court abused its discretion in entering the injunction.

IV.

For all of these reasons, we find that the Act is not unconstitutional either in its registration provision or its notification provision. We **REVERSE** the district court's decision insofar as it found that the state of Tennessee was required to provide sex offenders with a due process hearing prior to releasing registry information. We **AFFIRM** the district court's decision in upholding the registration provision. The injunction entered by the district court is dissolved.

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DISSENT

NATHANIEL R. JONES, Circuit Judge, dissenting. I disagree with the majority's conclusion that Cutshall is not entitled to a due process hearing before public disclosure of his sex offender registration and verification information can occur pursuant to Tenn. Code Ann. 40-39-106(c) and (d) (1994).[1] Like the district court, I believe that Cutshall is

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1. Those provisions provide:

> (c) For all offenses committed prior to July 1, 1997, except as otherwise provided in subsections (a) and (b), information reported on sexual offender registration/monitoring forms, verification/monitoring forms, and acknowledgment forms shall be confidential; provided, that the TBI or a local law enforcement agency shall release relevant information deemed necessary to protect the public concerning a specific sexual offender who is required to register pursuant to this chapter.
>
> (d) If the TBI or a local law enforcement agency deems it necessary to protect the public concerning a specific sexual offender who is required to register pursuant to this part, such bureau or agency may notify the public by any means including the following:
>
> (1) Written notice;
>
> (2) Electronic transmission of registration information; or
>
> (3) Providing on-line access to registration information.

Tenn. Code Ann. §§ 40-39-106(c), (d).

entitled to such a hearing. I also take issue with the majority's final resolution of this case. Because the district court elected to review the constitutionality of just one of the claims presented by the parties, multiple constitutional claims remain pending for resolution. I would therefore remand this case for additional findings by the district court. On these two grounds, I am compelled to dissent.

At the outset, let me make clear my intentions in dissenting. In no way should my dissent be read as minimizing the significant social problems we face as a result of the all-too-prevalent sexual offender crimes which occur. Such crimes, when committed against adults, and especially when committed against children, are an affront to the core values that I hold dear. Without question, sexual offenders and sexual predators present a danger, and must be diligently prosecuted to the fullest extent of the law. *See, e.g.*, Booth Gunter, *Sounding the Alarm on Sexual Predators*, TAMPA TRIBUNE, Mar. 2, 1997, at 1, available in 1997 WL 7037377; Vanessa Ho, *Sexual Predators Ride the Internet into Homes Across America*, SEATTLE POST-INTELLIGENCER, May 6, 1997, at A1, available in 1997 WL 3195702; Tamara Lytle, *Sexual Predators Lurk On-Line*, CHICAGO TRIBUNE, Nov. 8, 1997, at 10, available in 1997 WL 3608086; Jack Sullivan, *Potential for Danger from Sexual Predators is Growing*, BOSTON HERALD, Mar. 13, 1999, at 7, available in 1999 WL 3392637. Today, however, I write not in my role as husband, father and grandfather, but rather, in my role as judge — a role which requires me, when appropriate, to review state criminal statutes to determine whether they pass constitutional muster. A state statute designed to protect the public from criminals and criminal behavior — no matter how vile the crime — must comport with constitutional guarantees.

In my view, the district court correctly found that the guarantees secured by the Fourteenth Amendment's Due Process Clause require, at minimum, that a hearing be held prior to public disclosure of a sex offender's registration and verification information. *See Cutshall v. Sundquist*, 980 F.Supp. 928, 934 (M.D. Tenn. 1997); *see also E.B. v. Verniero*, 119 F.3d 1077, 1111 (3d Cir. 1997), *cert. denied*, __ U.S. __, 118 S.Ct. 1039 (1998); *Doe v. Pataki*, 3 F.Supp.2d 456, 471 (S.D.N.Y. 1998). The need to hold a due process hearing is made more acute by the fact that the Tennessee Act views all sex offenders the same, regardless of the severity of their crime(s). The sex offender statutes enacted in other states, by contrast, distinguish offenders for purposes of public information disclosure, and categorize them by the risk of recidivism (what the statutes call the risk of "re-offense"). *See, e.g.*, N.J. Stat. Ann. § 2C:7-8(c) (West 1995) (commonly known as "Megan's Law"). In the case of offenders who have committed severe sexual crimes, the public is provided a great deal of information, including the offender's name, address and photograph. Where the offender's sexual crime is less severe, the public is provided less information — for example, the offender's zip code, but not his address. *See Doe v. Pataki*, 120 F.3d 1263, 1268-70 (2d Cir. 1997), *cert. denied*, __ U.S. __, 118 S.Ct. 1066 (1998) (describing N.Y. Correct. Law § 168 *et seq.* (McKinney Supp. 1999)). Because the Tennessee Act foregoes such categorization, a due process hearing is of utmost importance, especially in the case of sex offenders whose crimes are less severe; the harm to them, should inaccurate disclosure to the public occur, would be great indeed.

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The purpose of the due process hearing is two-fold: to ensure that (1) the information to be disclosed is accurate; and (2) disclosure is in fact necessary to protect the public (as required by Tenn. Code Ann. §§ 40-39- 106(c) and (d)). *See Cutshall,* 980 F.Supp. at 934. To make that latter determination, the presiding judge will need to assess the danger to the community posed by the sex offender. I would place the initial burden of demonstrating compliance with this two-prong test on the prosecution, and afford the sex offender an opportunity to rebut those findings, particularly the "risk of danger to the community" assessment. In cases where the need to protect the public is great, and where notice to the public must quickly occur, this hearing could perhaps be expedited. In all cases, however, both the prosecution and the sex offender should be afforded an opportunity to present relevant evidence including, when necessary, testimony by expert witnesses. *See id.*

I also voice my objection to the majority's expansive view of its role in this case. The majority notes at the outset that it was "asked to decide whether the Act violates the United States Constitution, specifically, the Double Jeopardy, *Ex Post Facto,* Bill of Attainder, Due Process, or Equal Protection Clauses; the Eighth Amendment; the constitutional right to travel interstate; and the constitutional right to privacy." *Ante,* at 2. The district court, however, limited its discussion to just one issue: whether the Tennessee Act violates Cutshall's procedural due process rights. *See Cutshall,* 980 F.Supp. at 931. The district court concluded that "[b]ecause . . . the discretionary disclosure provisions of the Tennessee [Act] . . . violate[ ] the Due Process Clause of the Fourteenth Amendment . . . , [we] do[ ] not reach the

merits of the other constitutional challenges to the Act." *Id.* at 934. Recognizing that we are a reviewing court, and that our role is to review decisions rendered by the district courts, not make those decisions in the first instance, *see Roeder v. American Postal Workers Union, AFL-CIO*, 180 F.3d 733, 737 n.4 (6th Cir. 1999) (citing *United States v. Markwood*, 48 F.3d 969, 974 (6th Cir.1995)), I would limit the majority's discussion to a review of the district court's Fourteenth Amendment analysis, and remand this case for supplemental constitutional findings.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE DATED AND ENTERED SEPTEMBER 25, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

No. 3:95-0380

ARTHUR CUTSHALL,

Plaintiff,

v.

DON SUNDQUIST, Governor
of the state of Tennessee;

Defendant.

MEMORANDUM

Before the court is plaintiff, Arthur Cutshall's motion for summary judgment as well as defendant Governor Donald Sundquist's motion to dismiss or, in the alternative, for summary judgment. Plaintiff challenges the constitutionality of the Tennessee Sexual Offender Registration and Monitoring Act, alleging violations of: the ex post facto laws contained in Article 1 § 10 of the U.S. Constitution and Article 1, §§ 11 and 20 of the Tennessee Constitution; the prohibition against bills of attainder found in Article 1, § 10 of the U.S. Constitution; the double jeopardy clause of the

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Fifth Amendment of the U.S. Constitution; the Eighth Amendment of the U.S. Constitution; the right to privacy; the entitlement to substantive and procedural due process; the right to freely travel; and the right to equal protection guaranteed under the federal and state constitutions. Defendant maintains that plaintiff fails to state a claim upon which relief can be granted, as plaintiff allegedly lacks standing and asserts speculative claims. In the alternative, defendant proposes that summary judgment is appropriate based upon the lack of disputed facts. For the reasons stated below, plaintiff's motion for summary judgment is granted insofar as it pertains to the discretionary notification procedures in the Act and defendant's motion for summary judgment is granted insofar as it relates to registration of the plaintiff in the Tennessee sex offender registry.

I. Background and Procedural History

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C.A. § 14071 (West 1995), to assist law enforcement in creating a national database of former sex offenders. The passage of the act came in the wake of the brutal rape and murder of seven year-old Megan Kanka in New Jersey. Megan was killed by a neighbor who, unbeknownst to the Kankas, was a convicted sex offender.

Pursuant to a plea agreement, plaintiff Arthur Cutshall was convicted of the offense of aggravated sexual battery in February, 1990. Plaintiff received a sentence of twelve years, with release eligibility after serving thirty percent of his sentence. As a result of accumulation of "good time" credits, plaintiff is scheduled to be released this month.

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In 1994, subsequent to plaintiff's conviction, the state of Tennessee enacted the Sexual Offender Registration and Monitoring Act ("the Act"). Tenn. Code Ann. § 40-39-101 *et seq.* (1996). The act became effective January 1, 1995 and applies retroactively to those convicted of specified offenses.[1] It provides that anyone who meets the statutory definition of a sexual offender must register with the state by completing a TBI (Tennessee Bureau of Investigation) sexual offender registration form within ten days following release on probation, change of residence, or release from incarceration. Tenn. Code Ann. § 40-39-103 (1996). The TBI form requests the disclosure of the offender's name, date and place of birth, social security number, state and number of any valid driver license, name and address of any probation or parole officer responsible for supervising the offender, the sexual offenses of conviction, the location of the offender's employment, and the offender's address and length of residence at that address. *Id.* For all offenders convicted prior to July 1, 1997, this information remains confidential with the exception that the TBI "shall release relevant information deemed necessary to protect the public concerning a specific sexual offender." Tenn. Code Ann. § 40-39-106(c).

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1. These offenses include aggravated rape, rape, sexual battery, statutory rape, aggravated prostitution, sexual exploitation of a minor, aggravated sexual exploitation of a minor, especially aggravated sexual exploitation of a minor, incest, and attempt, solicitation or conspiracy to commit any of the above listed offenses. Tenn. Code Ann. § 40-39-102(3)

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II. Discussion

A. Summary Judgment Standard

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-1480 (6th Cir.1989). The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552. In responding to a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." Id. As there are no genuine issues of material fact, summary judgment is appropriate.

B. Procedural Due Process

Plaintiff contends that the Tennessee Act violates procedural due process. In order to assess the constitutionality of the Act, the court must distinguish between the registration provisions and the notification provision. All offenders must register with the TBI. There is nothing inherent in the act of registering that serves to trigger the protections of procedural due process. The Act, however, also contains a provision allowing law enforcement officials to disclose registry information at their discretion. Law enforcement officials must only determine that public safety necessitates disclosure of the information. No guidelines or procedures exist to rein

in this broad power held by law enforcement. The court therefore focuses on the discretionary notification provision in assessing the constitutionality of the Act under the due process clause.

In order to trigger the protections of procedural due process, plaintiff must demonstrate infringement by the state upon a property or liberty interest. *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972). While plaintiff alleges that his reputation will be sullied if the registry information is disclosed, the Supreme Court has held that damage to reputation alone is not sufficient to trigger procedural due process. *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976). In examining other cases where due process was deemed necessary, the Court found that "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 711. Thus, to invoke the protections of procedural due process, plaintiff must assert injury to a liberty or property interest in addition to damage to his reputation. This standard evolved into the "stigma plus" test. *W.P. v. Poritz*, 931 F. Supp. 1199, 1219 (D.N.J. 1996) (internal citations omitted). In the instant case, plaintiff has alleged an infringement upon his right to privacy and implicitly upon his right to follow a chosen profession, as well as the damage to his reputation resulting from public notification of the registry information.

The court must assess whether these rights exist and then determine whether notification would violate these rights in

such a way as to offend due process. Finally, if process is due, the court must determine what form that process should take.

1. Right to Privacy

"A right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. 113, 152, 93 S. Ct. 705, 726, 35 L. Ed. 2d 147 (1973). In 1965, the Supreme Court first held that there was a fundamental right to privacy, based in the penumbra of fundamental rights that surrounded the First Amendment. This right to privacy, originally extended to the right of couples to marital privacy, has since been broadened to include a wide variety of rights related to procreation, family, and child-rearing. *Paul v. Davis*, 424 U.S. 693, 713, 96 S. Ct. 1155, 1166, 47 L. Ed. 2d 405 (1976).

In *Whalen v. Roe*, 429 U.S. 589, 598-599, 97 S. Ct. 869, 876, 51 L. Ed. 2d 64 (1977), the court defined the right to privacy as involving two different types of interests: "the individual interest in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions." Lower courts have interpreted the first of these interests to establish a constitutional right to privacy in certain types of personal information, especially medical records, as well as the doctor-patient relationship. *Woods v. White*, 689 F. Supp. 874, 875 (E.D. Wis. 1988), *affirmed* 899 F.2d 17 (7th Cir. 1990). Although the Sixth Circuit reaffirmed its holding that "the Constitution does not encompass a general right to nondisclosure of private information," lower courts within the circuit have still held

that certain types of private information are protected by a right to privacy and need not be disclosed. *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994); *Mann v. University of Cincinnati*, 824 F. Supp. 1190, 1196 (S.D. Ohio 1993). The *Mann* court held that the right to privacy protected individuals from disclosure of personal information, particularly medical records. 824 F. Supp. at 1196. Although this right to privacy in nondisclosure of medical records is often outweighed by a governmental interest in disclosure of those records to certain parties, this governmental interest does not negate the general recognition of the underlying fundamental right. *Gutierrez v. Lynch*, 826 F.2d 1534, 1539 (6th Cir. 1987) (holding that legitimate requests for medical information by the state do not constitute an invasion of privacy); *Mann*, 824 F. Supp. at 1197 (explaining that courts must do a balancing test of a patient's right to privacy in her medical records and the potential interest of the state in accessing those records.); *Doe v. City of Cleveland*, 788 F. Supp. 979, 985 (N.D. Ohio 1991) (holding that the state had no legitimate interest in disclosing the fact that prisoner had AIDS to his former employer and that his privacy interest was thereby violated).

The Supreme Court has also found a right to privacy stemming from the Ninth Amendment. In his concurrence in *Griswold v. Connecticut*, Justice Goldberg opined that "the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." 381 U.S. 479, 492, 85 S. Ct. 1678, 1686, 14 L. Ed. 2d 510 (1965). Goldberg further stated that the right to privacy,

particularly in the context of procreation, constituted one of those rights fundamental to the existence of a free people, yet not specifically mentioned in the first eight amendments to the Constitution. *Id.* at 491-92. The inclusion of a right to privacy among fundamental rights did not create an unauthorized extension of the Constitution, but rather served as a legitimate means to further develop the concept of fundamental rights inherent in the Constitution. *Id.* at 492-93. The above principles lay the groundwork for plaintiff's right to privacy implicated by the notification procedures in the Tennessee Act.

In *Doe v. Poritz*, the New Jersey Supreme Court held that convicted sex offenders possessed a privacy interest grounded in the U.S. Constitution protecting the release of registry information to the public. 142 N.J. 1, 100 (1995). The court recognized that the branding of a sex offender as "potentially currently dangerous" by disclosing his registry information to the public, as well as the offender's interest in nondisclosure, impinged upon the privacy interests of a convicted sex offender. *Id.* Plaintiff Cutshall possesses the same privacy interest in the information contained in Tennessee's sexual offender registry.

The Supreme Court also has recognized a liberty interest in personal privacy. *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). The Court held that disclosure of FBI rap sheets to third parties constituted "an unwarranted invasion of personal privacy" for the purposes of the Freedom of Information Act. *Id.* at 751. The information contained in the rap sheets mirrors that in the sexual offender registry,

including such items as: name, date of birth and history of arrests, charges, convictions, and incarcerations. *Id.* at 752. The Court recognized that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person . . ." *Id.* at 764. Despite the fact that individual pieces of this information were accessible to the public, the Court, noting state restrictions on access to criminal history summaries, held that a privacy interest existed in the compilation of this information in a single rap sheet. *Id.* at 753, 764.

The state of Tennessee's constitutional jurisprudence also recognizes an individual right to privacy. The Supreme Court of Tennessee first acknowledged the right to privacy in *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). The Court stated, "Based on both the language and the development of our state constitution, we have no hesitation in drawing the conclusion that there is a right of individual privacy guaranteed under and protected by the liberty clauses of the Tennessee Declaration of Rights." *Id.* at 600.

The Tennessee Court of Appeals recently held that not only does the state constitution support an individual right to privacy, but this right extends more broadly than the right to privacy based in the U.S. Constitution. *Campbell v. Sundquist*, 926 S.W.2d 250, 261 (Tenn. Ct. App. 1996) (citing *Davis*). The *Campbell* court noted that, "The right to privacy, or personal autonomy ('the right to be let alone'), while not mentioned explicitly in our state constitution, is nevertheless reflected in several sections of the Tennessee Declaration of Rights . . ." *Id.* at 260. Therefore, not only does plaintiff have a privacy interest in the disclosure of

registry information based upon the federal Constitution, but he also possesses this right drawn from state law.

2. Right to Employment

Plaintiff also asserts that his ability to find a job would be hampered were information about his past conviction to be disclosed. The right to pursue employment of one's choosing rests within those liberties guaranteed by the Fourteenth Amendment. *Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 1411, 3 L.Ed.2d 1377 (1959); *Joelson v. U.S.*, 86 F.3d 1413, 1420 (6th Cir. 1996); and *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 602 (3d Cir. 1979).

In order to demonstrate infringement upon this liberty interest, "a plaintiff must demonstrate stigmatizing governmental action which so negatively affects his or her reputation that it effectively forecloses the opportunity to practice a chosen profession. A plaintiff must also allege in his or her complaint that the stigmatizing information was publicly disclosed." *Joelson*, 86 F.3d at 1420 (internal citations omitted).

Disclosure of registry information to the public fulfills the elements of the test set out in *Joelson*. As the New Jersey Supreme Court held, disclosure of registry information to the public, by implicitly branding that offender as a repetitive or compulsive sex offender, creates more stigma than the original conviction. *Doe v. Poritz*, 142 N.J. at 105. This certainly meets the element of demonstrating stigmatizing governmental action. There is no question that prospective

employers would not want to hire someone they thought posed a danger to society, thereby effectively foreclosing employment opportunities, as required in *Joelson*. As plaintiff only contends that this interest would be infringed upon in the event of disclosure, the last part of the *Joelson* test is satisfied as well.

3. "Stigma Plus"

The additional injury to plaintiff's reputation which would result from disclosure of registry information to the public (as the stigma) coupled with the loss of the rights to privacy and employment (as the plus) suffices to meet the "stigma plus" test set out in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); and in *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971). Plaintiff therefore deserves the protection of procedural due process before law enforcement may disclose information about him from the sex offender registry to those not involved in law enforcement.

The New Jersey Supreme Court in *Doe* held that the combination of harm to the plaintiff's reputation and the intrusion into his right to privacy sufficed to create a protectible interest deserving of procedural due process. *Doe v. Poritz*, 142 N.J. at 103. While it may appear that a convicted sex offender has little remaining interest in his reputation, the court held that "classification as a 'repetitive' and 'compulsive' sex offender . . . inflicts a greater stigma than that resulting from the conviction for a sex offense" which does not entail classification as either "repetitive" or "compulsive." *Id.* at 105. Thus, although the plaintiff's

conviction damaged his reputation, the additional harm incurred from public notification and all it implies, combined with the infringement on plaintiff's right to privacy, suffices to trigger due process protections. Although the court recognized the state's compelling interest in disclosing information to the public under certain circumstances, it held that the convicted offender has the right to traditional due process prior to the state acting on its interest. *Id.* at 103.

While the state may have an overriding interest in the public safety of its citizens and thereby in the dissemination of information regarding dangerous members of the community, the convicted offender still has enough of a privacy right to mandate an opportunity to challenge the validity of the information being disclosed by the state prior to disclosure. The state's interest in public safety does not outweigh the interest of the individual offender in not having false information disseminated which could permanently impair his liberty. A convicted sexual offender is therefore entitled to procedural due process prior to the dissemination of his registry information by law enforcement.

4. Procedural Requirements

Due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) (internal citations omitted). To comport with these requirements, plaintiff should be afforded the opportunity to be heard, including presenting the testimony of expert witnesses, on the issue of whether or not disclosure of his registry information is in fact necessary to protect the

public. The Third Circuit required similar protections in its recent decision in *E.B. v. Verniero*, __ F.3d __, 1997 WL 473107 (3rd Cir. (N.J.)). The New Jersey version of sexual offender registration and notification requires the classification of offenders into three tiers based upon the risk that they will re-offend. *Doe v. Poritz*, 142 N.J. 1 (1996). Any offender classified as Tier 2 or Tier 3 is entitled to a judicial proceeding to determine the validity of that classification before the public is notified of that offender's status. Not only did the *Verniero* court recognize the importance of these proceedings, but it held further that due process requires that the burden of persuasion in such a proceeding fall upon the prosecutor. *Verniero*, at *35. Plaintiff is entitled to similar protections prior to disclosure of information regarding his status as a convicted sexual offender.

Currently, the Tennessee statute allows disclosure simply on the basis of the discretion of law enforcement officials, with absolutely no guarantees that the disclosure is truly necessary. No procedures exist for law enforcement to follow in determining whether or not a convicted sex offender may be dangerous in the future. While the interest in public safety is compelling enough to allow for disclosure of registry information in certain circumstances, it violates due process to permit disclosure of registry information without providing the offender the opportunity to refute law enforcement's assessment of the risk of allowing that offender to blend anonymously back into society. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential" (internal citations omitted). *Paul v. Davis*, 424 U.S. at 707. Dissemination of

information from the sexual offender registry without the control of anyone other than local law enforcement and without an opportunity for hearing offends basic concepts of fairness. To remedy this deficiency, the state must provide a convicted offender with notice and opportunity to be heard prior to releasing this information to the public.

IV. Conclusion

Because the court holds that the discretionary disclosure provisions of the Tennessee Sexual Offender Monitoring and Registration Act violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, it does not reach the merits of the other constitutional challenges to the Act.

The court does hold that while the registration provisions of the Tennessee Act meet constitutional muster, the notification procedures offend notions of due process. Accordingly, discretionary notification of the type allowed by the statute must be preceded by a hearing with an opportunity to present witnesses, expert or otherwise, in which the law enforcement officials wanting to release the information must bear the burden of proving that public safety necessitates release of the offender's registry information.

An order granting plaintiff's motion for summary judgment regarding the notification provisions of the Act and granting defendant's motion for summary judgment regarding the registration provisions shall enter.

s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
Senior United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:95-0380

ARTHUR CUTSHALL,

Plaintiff,

v.

DON SUNDQUIST, Governor of the state of Tennessee;

Defendant.

ORDER

For the reasons put forth in the accompanying memorandum, the court hereby GRANTS in part and DENIES in part plaintiff Arthur Cutshall's motion for summary judgment. The court further GRANTS in part and DENIES in part defendant Governor Don Sundquist's motion for summary judgment. Specifically, the court GRANTS plaintiff's motion insofar as it relates to the constitutionality of the notification provisions of the Tennessee Sex Offender Registration Act, finding that the notification provisions violate the due process rights of plaintiff. The court GRANTS defendant's motion with regard to the registration provisions, finding that they do not violate the Constitution as alleged by plaintiff.

s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
Senior United States District Judge

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE DATED AND ENTERED SEPTEMBER 17, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:95-0380

ARTHUR CUTSHALL,

Plaintiff,

v.

DON SUNDQUIST, Governor of the state of Tennessee;

Defendant.

MEMORANDUM

I. INTRODUCTION

Before the court is plaintiff Arthur Cutshall's motion for a preliminary injunction. Plaintiff has filed an action against the state of Tennessee alleging the unconstitutionality of the Tennessee Sex Offender Registration and Monitoring Act ("the Act"). Plaintiff asserts violations of the ex post facto laws contained in Article 1 § 10 of the U.S. Constitution and Article 1, § 11 and 20 of the Tennessee Constitution, the prohibition against bills of attainder found in Article 1,

§ 10 of the U.S. Constitution, the double jeopardy clause of the Fifth Amendment of the U.S. Constitution, the Eighth Amendment of the U.S. Constitution, as well as the rights to privacy, substantive and procedural due process, freely travel and equal protection guaranteed under the federal and state constitutions. The Act requires that all those convicted of the sex crimes specified in the Act register with the Tennessee Bureau of Investigation within ten days of release. Registration requires the convicted sex offender to provide to the Tennessee Bureau of Investigation his name, address, crime of conviction, place of employment, date and place of birth, social security number, state and number of any valid driver license, and name and address of any probation or parole officer responsible for supervising the offender. Tenn. Code Ann. § 40-39-103 (1996). This information remains confidential, unless law enforcement officials decide disclosure is necessary for the protection of the public.

Plaintiff Cutshall has filed a motion for summary judgment and defendant Governor Don Sundquist has filed a motion to dismiss, or in the alternative for summary judgment. These motions are pending before the court.

Plaintiff Cutshall is serving a twelve year sentence for aggravated sexual battery. He was convicted in 1990, prior to the enactment of the Act. As a result of accumulation of good time credits, plaintiff's release is imminent. As registration under the Act is required within ten days of release from prison, plaintiff requested a preliminary injunction of the Act as it applies to him.

Appendix C

II. PRELIMINARY INJUNCTION

When deciding whether to issue a preliminary injunction, a court should address four factors: (1) the likelihood of success on the merits; (2) the irreparable harm that could result if the injunction is not issued; (3) the impact on the public interest; and (4) the possibility of substantial harm to others. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992) (citing *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 262 (6th Cir.1988)). The court need not find all four factors in order to grant a preliminary injunction, but rather must balance the four in arriving at its decision to grant or deny a request for preliminary injunction. *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995). The court addresses each factor in turn, bearing in mind "that if the plaintiff shows a substantial likelihood of success on the merits that the other three factors will favor the plaintiffs as well." *Planned Parenthood Association of Nashville v. McWherter*, 716 F. Supp. 1064, 1066 (M.D. Tenn. 1989)

A. Likelihood of Success on the Merits

Plaintiff raises a number of potential grounds upon which the Act might be found unconstitutional. Among the most compelling is plaintiff's assertion that the notification procedures violate his right to due process under the federal and Tennessee constitutions. The notification provision of the act simply states that law enforcement officials "may release relevant information deemed necessary to protect the public concerning a specific sexual offender." Tenn. Code Ann. § 40-39-106(c) (1996). Assessment of the necessity of

disclosure of registry information rests solely within the discretion of law enforcement. Under the Act, the convicted offender receives no opportunity to contest the necessity of the release of the information, nor do there appear to be any methods for checking or controlling this tremendous discretionary power held solely in the hands of law enforcement.

Plaintiff asserts that release of the information contained in the registry would subject him to the loss of a number of rights and interests including his right to due process, his right to privacy, and his travel rights. He further contends that the disclosure of registry information will result in plaintiff and his family being subject to "vigilantism, retribution, unjustified suspicion and stigma."

In order to trigger procedural due process, plaintiff must demonstrate infringement by the state upon a property or liberty interest. *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). While plaintiff alleges that his reputation will be sullied if the registry information is disclosed, the Supreme Court has held that damage to reputation alone is not sufficient to trigger procedural due process. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Plaintiff must assert injury to a liberty or property interest in addition to damage to his reputation.

Plaintiff has alleged an infringement upon his right to privacy and implicitly upon his right to follow a chosen profession. Infringement upon these rights in conjunction with the damage to plaintiff's reputation in potentially being branded a dangerous sex offender most likely suffices to

trigger the protections of procedural due process. An opportunity for a convicted offender to be heard would be required prior to notification of anyone outside the law enforcement community of registry information. Plaintiff has shown sufficient likelihood of success on the merits to meet that portion of the test for granting of a preliminary injunction.

B. Irreparable Harm in Absence of Injunction

Upon disclosure of plaintiff's registry information to anyone other than law enforcement, plaintiff would suffer irreparable harm. Because there is no procedure to predict whether or not law enforcement would find it necessary to disclose the fact that plaintiff is a convicted sex offender, the possibility of irreparable harm in the absence of a preliminary injunction is very real.

C. Impact on the Public Interest

The public may very well have an interest in knowing whether there is a dangerous sex offender living in their neighborhood. This interest, however, is not so significant as to outweigh the interest of a convicted sex offender in having an opportunity to refute whether he or she actually does pose a danger to the community before that information is released.

D. Possibility of Harm to Others

The possibility of harm to others cannot fairly be determined in this case. If plaintiff is dangerous, then the

public should be notified so as to take proper precautions. In this case, however, there is no evidence indicating whether or not plaintiff is likely to repeat his offense, thereby posing a danger to the community. Because the state is not required to prove that the plaintiff is a danger before notifying the public, the court has no basis upon which to assess the degree of risk posed by plaintiff.

III. CONCLUSION

In balancing the above four factors (with emphasis on the likelihood of success on the merits), the court DENIES the preliminary injunction as it relates to registration of the plaintiff in the state's sex offender registry and GRANTS the preliminary injunction as it relates to the potential disclosure of that registry information to anyone except those in law enforcement.

s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
Senior U.S. District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

No. 3:95-0380

ARTHUR CUTSHALL,

Plaintiff,

v.

DON SUNDQUIST, Governor
of the state of Tennessee;

Defendant.

ORDER

For the reasons described in the accompanying memorandum, the court GRANTS in part and DENIES in part plaintiff's motion for a preliminary injunction of the Tennessee Sex Offender Registration and Monitoring Act. The court DENIES the preliminary injunction as it relates to registration of the plaintiff in the state's sex offender registry and GRANTS the preliminary injunction as it relates to the potential disclosure of that registry information to anyone except those in law enforcement. The court needs additional time to consider the merits of the case. A memorandum and opinion in response to the pending motions for summary judgment and to dismiss will issue in the next ten days.

s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
Senior United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 19, 1999

97-6276/6321

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR CUTSHALL,

Plaintiff-Appellee/Cross-Appellant,

v.

DON SUNDQUIST, GOVERNOR OF THE STATE OF TENNESSEE,

Defendant-Appellant/Cross-Appellee.

ORDER

BEFORE: JONES, RYAN, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

Appendix D

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Jones would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX E — RELEVANT STATUTES AND RULES

Tenn. Code § 4-6-140

4-6-140. Records of inmates. — (a) The commissioner of correction shall keep in the commissioner's own office, accessible only to the commissioner's secretary, and proper clerks, except by the commissioner's consent, or the orders of the judge of a court of record, a record showing the name, residence, sex, age, nativity, occupation, condition and date of entrance or commitment of every inmate, patient or pupil in the several institutions governed by the commissioner, the date, cause and terms of discharge, and the conditions of such person at the time of leaving, and also all transfers from one (1) institution to another, and, if dead, the date and cause.

(b) These and such other facts as the commissioner may, from time to time, require shall be furnished by the managing officer of each institution, within ten (10) days after the commitment, entrance, death or discharge of an inmate, patient or pupil, and the managing officer shall make a special report within twenty-four (24) hours thereafter, giving the circumstances as fully as possible.

(c) Notwithstanding any other provision of law to the contrary, all inmate records and the information contained therein shall be open for public inspection. Any information contained in an inmate record that is otherwise made confidential by the provisions of § 10-7-504, shall remain confidential. The commissioner has the authority to delete from any such record the name of, or any identifying information concerning, any department employee, law enforcement officer or informant or other inmate if, in the

commissioner's opinion, public disclosure of such name or information would place the safety of such employee, law enforcement officer, informant or inmate in jeopardy. If the commissioner determines that a name or identifying information cannot be deleted in a manner sufficient to protect any such person, the commissioner may refuse to disclose the document in which such name or identifying information appears.

* * *

Tenn. Code § 4-21-101

4-21-101. Purpose and intent. — (a) It is the purpose and intent of the general assembly by this chapter to:

(1) Provide for execution within Tennessee of the policies embodied in the federal Civil Rights Acts of 1964, 1968 and 1972, the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967, as amended;

(2) Assure that Tennessee has appropriate legislation prohibiting discrimination in employment, public accommodations and housing sufficient to justify the deferral of cases by the federal equal employment opportunity commission, the department of housing and urban development, the secretary of labor and the department of justice under those statutes;

(3) Safeguard all individuals within the state from discrimination because of race, creed, color, religion, sex,

age or national origin in connection with employment, public accommodations, and because of race, color, creed, religion, sex or national origin in connection with housing;

(4) Protect their interest in personal dignity and freedom from humiliation;

(5) Make available to the state their full productive capacity in employment;

(6) Secure the state against domestic strife and unrest which would menace its democratic institutions;

(7) Preserve the public safety, health and general welfare; and

(8) Further the interest, rights, opportunities and privileges of individuals within the state.

(b) The prohibitions in this chapter against discrimination because of age in connection with employment and public accommodations shall be limited to individuals who are at least forty (40) years of age.

* * *

Tenn. Code § 39-13-524

39-13-524. Sentence of community supervision for life. — (a) In addition to the punishment authorized by the specific statute prohibiting the conduct, any person who, on or after July 1, 1996, commits a violation of § 39-13-502,

§ 39-13-503, § 39-13-504, § 39-13-522, or attempts to commit a violation of any such section, shall receive a sentence of community supervision for life.

(b) The judgment of conviction for all persons to whom the provisions of subsection (a) apply shall include that such person is sentenced to community supervision for life.

(c) The sentence of community supervision for life shall commence immediately upon the expiration of the term of imprisonment imposed upon such person by the court or upon such person's release from regular parole supervision, whichever first occurs.

(d)(1) A person on community supervision shall be under the jurisdiction, supervision and control of the board of probation and parole in the same manner as a person under parole supervision. The board is authorized on an individual basis to establish such conditions of community supervision as are necessary to protect the public from such person committing a new sex offense as well as promoting the rehabilitation of the person.

(2) The board is authorized to impose and enforce a supervision and rehabilitation fee upon a person on community supervision similar to the fee imposed by § 40-28-201. To the extent possible, the board shall set such fee in an amount that will substantially defray the cost of the community supervision program. The board shall also establish a fee waiver procedure for hardship cases and indigency.

* * *

Appendix E

Tenn. Code § 39-13-525

39-13-525. Release from community supervision. — (a) After a person sentenced to community supervision pursuant to § 39-13-524 has been on such supervision for a period of fifteen (15) years, such person may petition the sentencing court for release from community supervision.

(b) Upon receiving such a petition, the court shall, at least thirty (30) days prior to a hearing on the petition, cause the office of the district attorney general responsible for prosecuting the person to be notified of the person's petition for release from supervision. Upon being notified, the district attorney general shall conduct a criminal history check on such person to determine if the person has been convicted of a criminal offense during the period of community supervision. The district attorney general shall report the results of such criminal history check to the court, together with any other comments the district attorney general may have concerning the person's petition for release. The district attorney general may also appear and testify at the hearing in lieu of or in addition to submitting written comments.

(c) Between the date the petition is filed with the court and the date established by the court for a hearing on the petition, if the person is entitled to a hearing, the person shall be examined and evaluated by a psychiatrist or licensed psychologist with health service designation approved by the board. The cost of such examination and evaluation shall be the sole responsibility of the person petitioning for release from supervision. No hearing on such petition may be conducted until such person has been examined and evaluated in accordance with this subsection.

(d)(1) If the report of the district attorney general indicates that the petitioner has been convicted of a criminal offense while under community supervision, the court shall deny the petition without conducting a hearing.

(2) If the report of the district attorney general indicates that the petitioner has not been convicted of a criminal offense while under community supervision, the court shall conduct a hearing on the petition. At the hearing, the court shall call such witnesses, including the examining psychiatrist or licensed psychologist with health service designation or the prosecuting district attorney general, as the court deems necessary to reach an informed and just decision on whether the petitioner should be released from community supervision. The petitioner may offer such witnesses and other proof at the hearing as is relevant to the petition.

(3) If a petition for release from supervision is denied by the court, such person may not file another such petition for a period of three (3) years.

* * *

Tenn. Code § 39-13-703

39-13-703. Definitions. — As used in this part, unless the context otherwise requires:

(1) "Board" means the sex offender treatment board created in § 39-13-704;

(2) "Sex offender" means any person who is convicted in this state, on or after January 1, 1996, of any sex offense, or if such person has been convicted in another state of an offense that would constitute a sex offense in this state, and who is subject to parole or probation supervision by the board of probation and parole pursuant to an interstate compact;

(3) "Sex offense" means any felony or misdemeanor offense described as follows:

(A) Rape of a child, as defined in § 39-13-522;

(B) Aggravated rape, as defined in § 39-13-502;

(C) Rape, as defined in § 39-13-503;

(D) Aggravated sexual battery, as defined in § 39-13-504;

(E) Sexual battery, as defined in § 39-13-505;

(F) Statutory rape, as defined in § 39-13-506;

(G) Incest, as defined in § 39-15-302;

(H) Criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in this subdivision (3); or

(I) Criminal responsibility for the facilitation of a felony when the specific felony facilitated is

any of the offenses specified in this subdivision (3); and

(4) "Treatment" means therapy and supervision of any sex offender which conforms to the standards created by the board pursuant to § 39-13-704.

* * *

Tenn. Code § 40-28-119

40-28-119. Records of parolees. — (a) The board shall cause to be kept records which may include social, physical, mental, psychiatric and criminal information for every inmate considered for or released, under its supervision. The board shall also cause to be kept the same records for every person placed on probation supervision. Such records shall contain reports of probation and parole officers with relation to such probationers and parolees.

(b) Such records shall be filed in the central office of the board and shall be organized in accordance with the most modern methods of filing and indexing so there will always be immediately available information about each such probationer and parolee.

(c) The board may make rules, as it deems proper, as to the privacy of such records and of the records of its employment bureau, and their use by others than the board and its staff.

* * *

Appendix E

Tenn. Code § 40-39-101

40-39-101. Short title.

This chapter shall be known and may be cited as the "Sexual Offender Registration and Monitoring Act."

* * *

Tenn. Code § 40-39-102

40-39-102. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Local law enforcement agency" means:

(A) Within territory of a municipality, the municipal police force;

(B) Within territory of a county having a metropolitan form of government, the metropolitan police force; and

(C) Within unincorporated territory of a county, the sheriff's office;

(2) "Sexual offender" means a person who is, or has been, convicted in this state of committing a sexual offense or who is, or has been, convicted in another state of committing an act which would have constituted a sexual offense if it had been committed in this state; provided, that:

(A) Conviction occurs on or after January 1, 1995; or

(B) If conviction occurred prior to January 1, 1995, the person:

(i) Remains under or is placed on probation, parole, or any other alternative to incarceration on or after January 1, 1995;

(ii) Is discharged from probation, parole, or any other alternative to incarceration on or after January 1, 1995; or

(iii) Is discharged from incarceration without supervision on or after January 1, 1995;

(3) "Sexual offense" means:

(A) The commission of any act that, on or after November 1, 1989, constituted the criminal offense of:

(i) Aggravated rape, under § 39-13-502;

(ii) Rape, under § 39-13-503;

(iii) Aggravated sexual battery, under § 39-13-504;

(iv) Sexual battery, under § 39-13-505;

(v) Statutory rape, under § 39-13-506;

(vi) Aggravated prostitution, under § 39-13-516;

(vii) Sexual exploitation of a minor, under § 39-17-1003;

(viii) Aggravated sexual exploitation of a minor, under § 39-17-1004;

(ix) Especially aggravated sexual exploitation of a minor, under § 39-17-1005;

(x) Incest, under § 39-15-302; or

(xi) Attempt, under § 39-12-101, solicitation, under § 39-12-102, or conspiracy, under § 39-12-103, to commit any of the offenses enumerated within this subdivision (3)(A); or

(B) The commission of any act that, prior to November 1, 1989, constituted the criminal offense of:

(i) Aggravated rape, under § 39-2-603 [repealed];

(ii) Rape, under § 39-2-604 [repealed];

(iii) Aggravated sexual battery, under § 39-2-606 [repealed];

(iv) Sexual battery, under § 39-2-607 [repealed];

(v) Statutory rape, under § 39-2-605 [repealed];

(vi) Assault with intent to commit rape or attempt to commit rape or sexual battery under § 39-2-608 [repealed];

Appendix E

(vii) Incest, under § 39-4-306 [repealed];

(viii) Use of minor for obscene purposes, under § 39-6-1137 [repealed];

(ix) Promotion of performance including sexual conduct by minor, under § 39-6-1138 [repealed];

(x) Criminal sexual conduct in the first degree, under § 39-3703 [repealed];

(xi) Criminal sexual conduct in the second degree, under § 39-3704 [repealed];

(xii) Criminal sexual conduct in the third degree, under § 39-3705 [repealed];

(xiii) Solicitation, under § 39-1-401 [repealed] or § 39-118(b) [repealed], attempt, under § 39-1-501 [repealed], § 39-605 [repealed], or § 39-606 [repealed], or conspiracy, under § 39-1-601 [repealed] or § 39-1104 [repealed], to commit any of the offenses enumerated within subdivision (3)(B); and

(4) "TBI" means the Tennessee bureau of investigation.

* * *

Appendix E

Tenn. Code § 40-39-103

40-39-103. Sexual offender registration — Monitoring forms — Contents.

Within ten (10) days following release on probation, parole, or any other alternative to incarceration; within ten (10) days following discharge from incarceration without supervision; within ten (10) days following any change of residence; and within ten (10) days after coming into a municipality or county in which the sexual offender temporarily resides or is domiciled for such length of time; each sexual offender shall complete a TBI sexual offender registration/monitoring form and shall cause such form to be delivered to TBI headquarters in Nashville. Sexual offender registration/monitoring forms shall require disclosure of the following information:

(1) Complete name as well as any alias;

(2) Date and place of birth;

(3) Social security number;

(4) State of issuance and identification number of any valid driver license;

(5) For a sexual offender on supervised release, the name, address, and telephone number of the registrant's parole officer, probation officer or other person responsible for the registrant's supervision;

(6) Sexual offense or offenses of which the registrant has been convicted;

(7) Current place and length of employment;

(8) Current address and length of residence at such address; and

(9) Such other registration and/or monitoring information as may be required by rules promulgated by the TBI in accordance with the provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

* * *

Tenn. Code § 40-39-104

40-39-104. Verification — Monitoring forms.

At least once every ninety (90) days following receipt of the initial registration/monitoring form pursuant to § 40-39-103, the TBI shall mail a nonforwardable, verification/monitoring form to the registrant's last reported address. The form shall require verification of the continued accuracy of the most recent registration/monitoring form submitted by the sexual offender. Within ten (10) days following receipt of the verification/monitoring form, the registrant shall complete the form and shall cause such form to be delivered to TBI headquarters in Nashville.

* * *

Appendix E

Tenn. Code § 40-39-105

40-39-105. Creation and distribution of forms — Acknowledgment forms.

(a) Sexual offender registration/monitoring forms and verification/monitoring forms shall be designed, printed, and distributed by and at the expense of the TBI. Sexual offender registration/monitoring forms shall be available from local law enforcement agencies; the TBI; the Tennessee department of correction; the Tennessee department of safety; and parole officers, probation officers, and other public officers and employees assigned responsibility for the supervised release of convicted felons into the community.

(b)(1) The officer or employee responsible for supervising a sexual offender who is, or has been, released on probation, parole, or any other alternative to incarceration, shall promptly obtain the offender's signed statement acknowledging that the named officer or employee:

(A) Has fully explained, and the offender understands, the registration and verification requirements and sanctions of this chapter; and

(B) Has provided the offender with a blank TBI sexual offender registration/monitoring form.

(2) Forms for such statements of acknowledgment shall be designed, printed, and distributed by, and at the expense of, the TBI and shall require the officer or employee to report the offender's residential address. The officer or employee

shall cause the signed and completed acknowledgment form to be delivered to TBI headquarters in Nashville.

(c) At least ninety (90) days prior to the release of a sexual offender from incarceration with or without supervision, the warden of the correctional facility or jail shall obtain the offender's signed statement acknowledging that the named warden or the warden's agent has fully explained, and the offender understands, the registration and verification requirements and sanctions of this chapter. Forms for such statements of acknowledgment shall be designed, printed, and distributed by, and at the expense of, the TBI and shall require disclosure of the offender's anticipated residential address. The warden shall promptly cause the signed and completed acknowledgment form to be delivered to TBI headquarters in Nashville.

(d) Through press releases, public service announcements, and through other appropriate public information activities, the TBI shall strive to ensure that all sexual offenders, including those who move into this state, are informed and periodically reminded of the registration and verification requirements and sanctions of this chapter.

* * *

Tenn. Code § 40-39-106

40-39-106. Centralized record system — Reporting — Apprehension of violators — Immunity from liability.

(a) Using information received or collected pursuant to this chapter, the TBI shall establish, maintain, and update a

centralized record system of sexual offender registration and verification information. The TBI shall promptly report current sexual offender registration and verification information to:

(1) The local law enforcement agency for the offender's place of residence;

(2) The local law enforcement agency for the offender's previous place of residence if a change of residence is indicated;

(3) The local law enforcement agency for the offender's place of employment;

(4) The local law enforcement agency for the offender's previous place of employment if a change of employment is indicated;

(5) When applicable, the probation officer, parole officer, or other public officer or employee assigned responsibility for the offender's supervised release; and

(6) The identification division of the federal bureau of investigation.

(b) Upon request of the TBI, a local law enforcement agency, probation officer, parole officer, or other public officer or employee assigned responsibility for the offender's supervised release, shall assist in the investigation and apprehension of a sexual offender suspected of violating the provisions of this chapter.

(c) Except as otherwise provided in subsections (a) and (b), information reported on sexual offender registration/monitoring forms, verification/monitoring forms, and acknowledgment forms shall be confidential; provided, that the TBI or a local law enforcement agency may release relevant information deemed necessary to protect the public concerning a specific sexual offender who is required to register pursuant to this chapter.

(d) Notwithstanding the provisions of any law to the contrary, officers and employees of the TBI; officers and employees of local law enforcement agencies; probation officers; parole officers; and other public officers and employees assigned responsibility for sexual offenders' supervised release into the community; shall be immune from liability relative to their good faith actions, omissions, and conduct pursuant to this chapter.

* * *

Tenn. Code § 40-39-107

40-39-107. Petition to remove duty to report — Hearings — Required findings.

(a) No sooner than ten (10) years after termination of active supervision on probation, parole, or any other alternative to incarceration or no sooner than ten (10) years after discharge from incarceration without supervision, a person required to submit sexual offender registration/monitoring forms and verification/monitoring forms may file a petition in the circuit court of the county in which the person

resides for an order relieving the person of the continuing duty to submit such forms. The district attorney general of the county shall be named and shall serve as the respondent in the petition.

(b) The court shall hold a hearing on the petition. In determining whether to grant the relief requested, the court shall consider:

(1) The nature of the offense that required registration;

(2) The age and number of victims;

(3) The degree of violence involved in the offense;

(4) Other criminal and relevant noncriminal behavior of the petitioner both before and after the conviction that required registration;

(5) The period of time during which the petitioner has not reoffended; and

(6) Any other relevant factors.

(c) If, and only if, the court finds that the petitioner:

(1) Has complied with the provisions of this chapter;

(2) Is rehabilitated; and

(3) Does not pose a threat to the safety of the public,

then the court shall enter an order relieving the petitioner of the continuing duty to submit registration/monitoring forms and verification/monitoring forms. Upon receiving a certified copy of such order of the court, the TBI shall expunge from the centralized record system of sexual offender registration and verification information all data pertaining to the petitioner and shall so notify the local law enforcement agency for the petitioner's place of residence and the local law enforcement agency for the petitioner's place of employment.

* * *

Tenn. Code § 40-39-108

40-39-108. Violations — Penalties.

Knowing falsification of a sexual offender registration/monitoring form or verification/monitoring form shall constitute a Class A misdemeanor for the first offense, punishable by confinement in the county jail for not less than one hundred eighty (180) days and shall constitute a Class E felony for the second or subsequent offense. Additionally, if the person is on probation, parole, or any other alternative to incarceration, then such falsification shall also constitute sufficient grounds for, and may result in, revocation of probation, parole, or other alternative to incarceration. Knowing failure to timely disclose required information or to timely deliver required registration/monitoring or verification/monitoring forms to the TBI shall be deemed to be falsification to the same extent as actually providing false information.

* * *

Appendix E

RULES
OF
THE TENNESSEE DEPARTMENT OF CORRECTION
ADMINISTRATIVE SERVICES DIVISION

* * *

0420-1-2-.01 POLICY. Information contained in inmate records maintained by the Department of Correction will be available to the public upon demand, except for the information which is confidential by law or the release of which would place the safety of an employee, law enforcement officer or informant, or other inmate in jeopardy.

* * *

0420-1-2-.02 LOCATION. The Department of Correction's official inmate record files are located in the Rachel Jackson State Office Building, 320 Sixth Avenue North, Nashville, Tennessee. Institutions may not release information from their inmate institutional files directly to the public.

* * *

0420-1-2-.03 REQUEST FOR INMATE INFORMATION. Any individual wanting to view and/or retrieve information contained in a current or former inmate's record must first submit a written request for the desired information. This request for information must include:

(1) The name, address and telephone number of the person making the request,

(2) The reason for the request, and

(3) What information or documents are requested. (A list of available information will be provided on request.)

* * *

0420-1-2-.04 ACCESS.

(1) Because the Department of Correction maintains its inmate records on microfilm, advance arrangements to view and/or retrieve information from the Department's inmate record files must be made.

(2) Arrangements to view and/or retrieve information from inmate record files may be made by contacting:

Public Information Officer
Department of Correction
Fourth Floor, Rachel Jackson State Office Building
320 Sixth Avenue North
Nashville, Tennessee 37219-5252
(615) 741-2072

(3) Members of correctional, law enforcement, judicial or social services agencies should contact:

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Manager
Operational Support Services
Management Information Services
Department of Correction
Ground Floor, Rachel Jackson State Office Building
320 Sixth Avenue North
Nashville, Tennessee 37219-5252
(615) 741-0737

* * *

0420-1-2-.05 PROCESSING OF REQUEST FOR INMATE INFORMATION. The manager of the Department's operational support services section, or a designee, will be responsible for gathering and initially reviewing the requested inmate information and will respond directly to information requests originating from members of correctional, law enforcement, judicial or social services agencies. The public information officer shall respond to all other requests for inmate information after obtaining the desired information from the operational support services manager/designee. While the actual time for processing a request for inmate information will depend upon the volume of requests received and the complexity of the information desired, an effort should be made to respond to the request within two weeks of its receipt. There will be a charge of $10.00 plus 20 cents per page for providing copies of any requested information.

* * *

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0420-1-2-.06 CONFIDENTIAL INMATE INFORMATION.

(1) The following information is considered confidential and shall not be released to the general public absent a valid court order or subpoena:

(a) Inmate medical or mental health records.

(b) Inmate educational records.

(c) Investigative records or reports of the Department's internal affairs section.

(d) The name or any identifying information relating to any Department of Correction employee, law enforcement officer or informant or inmate, the public disclosure of which would tend to place the safety of said individual in jeopardy.

Inmates may, however, review and obtain copies of their educational, medical or mental health records as provided for in Department of Correction policy, and copies of these records may be released with the inmate's consent.

(2) Any individual whose request for information from an inmate's record is denied shall be informed of the reason for the denial of the request and may appeal any such denial to the commissioner, or an individual designated by the commissioner to hear such appeals.

(3) Any individual whose request for inmate information is denied following appeal to the commissioner, or his designee, may obtain judicial review of the denial pursuant to *T.C.A. §10-7-505.*

* * *

1100-1-1-.14 CONFIDENTIALITY OF PAROLE AND CLEMENCY RECORDS.

(1) Confidential Information.

(a) The following information is considered confidential by the Board and will not be released unless listed as an exception under rule 1100-1-1-.14(4).

1. Information contained in Board files that is produced, supplied or generated by other agencies. Individuals making inquiry of such information shall be informed whether such information is contained in Board files and, if so, directed to the controlling agency.

2. Psychological evaluations provided, however, that such may be released to mental health officials who are treating the inmate/parolee if a release of information form signed by the inmate/parole is presented with the request.

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3. Facts-of-the-Offense Report

4. Medical Records

5. Parolees' home and work addresses and telephone numbers

6. Parole Officers' opinions and statements recorded in the case file.

7. Parole Officers' opinions and statements recorded in the case file.

8. Written clemency recommendations to the Governor.

9. Statements in opposition of a parolee by victims, families of victims, families of inmates; private citizens who request confidentiality; public officials who request confidentiality.

10. Other information. The release of which the Board specifically finds would be a serious safety risk to the public, staff, parolee or inmate.

(2) Information Available for Release.

(a) The following information may be released upon a verbal or written request indicating the name of the individual making the request, date

Appendix E

of request, and the specific information requested.

1. hearing and decision-making policy and procedures

2. whether an inmate; is being considered for parole or clemency

3. whether parole or clemency has been granted or denied

4. effective date for parole

5. statements in support of a parole

6. statements in opposition of a parole which do not fall within the purview of (1)(a)(9).

7. clemency applications and supporting documentation

8. date, time and location of hearings

9. parole certificates

10. reasons for the Board decisions listed on Notice of Board Action

11. social security numbers may be released to employers

(b) Requests for information from field supervision files shall be directed to the Regional Director or his/her designee. The Regional Director or his/her designee will review the records and release information available under rule 1100-1-1-. 14(2)(a).

(3) Any person may make a written request to the Board the release of any other information. The Board shall review such request and determine whether or not such information may be released.

(4) Requests From Law Enforcement Officials. Law enforcement officials who are conducting active investigations shall be provided information as necessary to assists in their investigations. Upon verification of the identity of the requesting official the following information may be released:

(a) parolee's aliases

(b) parolee's M.O. (modus operandi or mode of operation)

(c) parolee's address

(d) parolee's place of employment

(e) parolee's photographs and fingerprints

(f) parolee's social security number

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(g) parolee's telephone number

(h) facts-of-the-offense reports

(i) whether a Board of Parolees' warrant has been issued and a parolee has been arrested on a Board of Parolees' warrant

(j) violation reports

(k) information on assets of persons currently or previously on parole who owe court fines.

Other information may be released to law enforcement officials upon written request, subject to Board approval unless listed as an exception under rule 1100-1-1-.14(1)(a).

* * * *

Supreme Court, U.S.
FILED
MAR 6 2000
CLERK

(2)

No. 99-1123

In The

Supreme Court of the United States

ARTHUR CUTSHALL,

Petitioner,

v.

DON SUNDQUIST, in his official capacity as Governor of the State of Tennessee,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT DON SUNDQUIST IN OPPOSITION

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19pp

QUESTIONS PRESENTED

Whether the Sixth Circuit correctly upheld Tennessee's Sex Offender Registry and Monitoring Act, after finding that the Act

a. is not a punishment violating the Double Jeopardy Clause or the Ex Post Facto Prohibition;

b. does not violate the right to travel interstate;

c. does not impose "stigma plus" an alteration of petitioner's legal status;

d. does not violate any alleged "right to pursue gainful employment;" and

e. does not violate any alleged constitutional privacy interest.

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STATEMENT OF THE CASE

This case concerns the constitutionality of the Tennessee Sex Offender Registry and Monitoring Act. Tenn. Code Ann. §§ 40-39-101 to -108. Respondent offers the following as a correct account of the pertinent facts in this case:

1. Origin of the Tennessee Act. In 1994, Congress enacted, and the President signed into law, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (the Federal Act). Under this legislation, the Attorney General of the United States was required to establish guidelines for state programs requiring persons convicted of crimes against minors or crimes of sexual violence to register a current address with state law enforcement officials. 42 U.S.C. § 14071(a)(1)(A); *Cutshall v. Sundquist*, 193 F.3d 466, 469 (6th Cir. 1999), *rehearing en banc denied* (6th Cir., November 19, 1999).

The Federal Act provides in part:

> The information collected under a State registration program shall be treated as private data except that – (1) such information may be disclosed to law enforcement agencies for law enforcement purposes; (2) such information may be disclosed to government agencies conducting confidential background checks; and (3) the designated State law enforcement agency and any local law enforcement agency authorized by the State agency may release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim

> of an offense that requires registration under this section shall not be released.

42 U.S.C. § 14071(d) (1994).

Under the Federal Act, the states were given three years from September 1, 1994, within which to comply. *See* 42 U.S.C. § 14071(f)(1) (1994). Failure to implement a registration program would result in the loss of some federal funding. *See* 42 U.S.C. § 14071(f)(2)(A).

In 1994, Tennessee complied with the Federal Act by adopting its own sex offender registration and monitoring act. Tenn. Code Ann. §§ 40-39-101 to -108. The Tennessee Bureau of Investigation (TBI) is charged with administration of the Tennessee Act. Tenn. Code Ann. § 40-39-106(a).

2. Provisions of the Tennessee Act. A sex offender approaching release from incarceration receives a "Sexual Offender Release Notification" which advises of the legal requirement to register. (R. 22 Addendum at p. 23, Apx. at p. 71). Within ten days after release, the registrant is required to supply limited information to the registry, such as the registrant's name and aliases, some identifying information, current and previous address and phone number, and the name, address, and phone number of a current or previous employer. Tenn. Code Ann. §§ 40-39-103 and -106(a) (R. 22 Addendum at pp. 3-5, Apx. at pp. 50-52). Quarterly, the registry sends a letter to the registrant requesting updated information. Tenn. Code Ann. § 40-39-104 (R. 22 Addendum at p. 4, Apx. at p. 51).

Limited public release of registry information is allowed only when "necessary to protect the public

concerning a *specific* sexual offender. . . . " Tenn. Code Ann. § 40-39-106(c) (emphasis added). Even then only information "relevant" to a threat to public safety may be released. *Id.*

Pursuant to the "Sex Offender Registry Instructions for Department of Correction, Board of Parole, and Law Enforcement Officials," under the "Confidentiality" section, the TBI advises that:

> Information may only be released on a *specific* offender by local law enforcement if it is deemed to be in the interest of public safety. Lists of offenders shall not be released.

(R.22 Addendum at p. 21, Apx. at p. 69).

3. Procedural History. In anticipation of his release from prison and the requirement that he register upon release, petitioner filed a complaint in the United States District Court for the Middle District of Tennessee pursuant to 42 U.S.C. § 1983 asking that the Tennessee Act be declared unconstitutional and that its enforcement against him be enjoined. On September 17, 1997, the district court entered a preliminary injunction against enforcement of the Tennessee Act. On September 25, 1997, after oral argument on cross-motions for summary judgment, the district court entered a final order. Without discussion, the trial court held registration under the Tennessee Act to be constitutional, but held that dissemination of registry information outside the law enforcement community could occur only after petitioner was given pre-release notice and an opportunity to be heard.

The parties filed cross-appeals to the Sixth Circuit. After oral argument, the court of appeals, in a two-to-one

decision, upheld the Tennessee Act in its entirety. Petitioner's request for rehearing en banc was denied. Petitioner now asks this Court to grant discretionary review. Respondent opposes the petition.

ARGUMENT

1. The decision below upholding the Tennessee Act correctly applied the precedent of this Court.

Petitioner contends that the Sixth Circuit "ignored substantial evidence of punitive intent" and failed to perform a "fair reading of the text and structure of the Act." He urges this Court to declare that the purported evidence of punitive intent in the legislative history of the Tennessee Act is paramount and controlling and requires striking down the Act as a violation of the Double Jeopardy Clause, the Ex Post Facto Prohibition, the right to travel interstate, a purported "right to pursue gainful employment," and an alleged constitutional privacy interest. Because the Sixth Circuit correctly applied the precedent of this Court in upholding the Tennessee Act, and petitioner fails to identify any conflict between the decision below and the decisions of other circuits, this case does not present an occasion for an exercise of this Court's certiorari jurisdiction.

A. The Sixth Circuit correctly determined that the Tennessee Act is not a punishment under the Double Jeopardy Clause.

Petitioner wants this Court to "declare the role of legislative history in the determination of punitive intent" under the intent-effects test of *Hudson v. United States*, 522 U.S. 93 (1997). (Petition at 13). He contends that the "Sixth Circuit improperly ignored . . . substantial evidence of punitive intent," and that the "clear statements of the Act's sponsors and other legislators *should have* been given substantial weight and *should have* acted as authoritative guides to the conclusion that the Tennessee legislature intended the Tennessee Sexual Offender Registration and Monitoring Act to serve punitive purposes." (Petition at 15, 17) (emphasis added).

Notwithstanding the petitioner's assertions regarding what the law "should" be, the Sixth Circuit noted his reliance upon the legislative history, but followed well-settled precedent and looked "primarily to [the] language" of the Tennessee Act for its intent. *Cutshall*, 193 F.3d at 472, 474. This Court has repeatedly held that "[t]he starting point in every case involving the construction of a statute is the language itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). Finding no ambiguity in the text of the statutes, the Sixth Circuit found no need to address legislative history any further.

The unambiguous text of the Tennessee Act either duplicates or follows the text of the Federal Act, 42 U.S.C. § 14071; some variation of which has now been adopted

by all 50 states. (Petition at 27). The Sixth Circuit noted Tennessee's need to comply with the Federal Act by either passing a derivative act or facing monetary sanction for failing to do so. *Cutshall*, 193 F.3d at 470. It would have produced a great anomaly for the Sixth Circuit to find that the Tennessee Act, alone among the 51 textually similar laws adopted by other jurisdictions, was "punishment" simply because of the comments of a few legislators.

Indeed, this Court has denied review in other cases in which courts of appeals upheld the constitutionality of similar state acts against ex post facto challenges. *Doe v. Pataki*, 120 F.3d 1263, 1276 (2d Cir. 1997) (held New York Act notification provisions were not ex post facto punishment), *cert. denied*, 522 U.S. 1122 (1998); *Russell v. Gregoire*, 124 F.3d 1079, 1086-1087 (9th Cir. 1997) (held Washington State Act notification provisions were not ex post facto punishment), *cert. denied*, 523 U.S. 1007 (1998); *E.B. v. Verniero*, 119 F.3d 1077 (3rd Cir. 1996) (held that New Jersey Act was not ex post facto punishment), *cert. denied*, 522 U.S. 1110 (1998).

Petitioner further complains that the majority "*ignored* the substantial evidence of punitive intent found in the text of the [Tennessee] Act and in other provisions of the Tennessee Code." (Petition at 17) (emphasis added). He urges that "[a] *fair reading* of the text and structure of the Act would have *bolstered* the conclusion from the legislative history that the Act was meant to serve punitive purposes." (Petition at 17) (emphasis added).

This argument not only reverses the order of precedence in statutory construction by using text to "bolster" legislative history, it is simply incorrect. The Sixth Circuit did not "ignore" the effect of the Tennessee Act or fail to give it a "fair reading" under Double Jeopardy analysis. In fact, the court performed an exhaustive review of the factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to conclude that the effect of the Tennessee Act is non-punitive. *Cutshall*, 193 F.3d at 473-76. As the court below correctly determined, Tennessee adopted its version of the act to comply with Federal law, to assist law enforcement in solving crimes, and to help the public protect itself.

B. The Sixth Circuit correctly determined that the Tennessee Act is not a punishment under the Ex Post Facto Prohibition.

Applying the test in *Lynce v. Mathis*, 519 U.S. 433 (1997), there is no dispute about the retroactive application of the Tennessee Act. As in his Double Jeopardy challenge, petitioner asks this Court to "declare the role of legislative history in the determination of punitive intent" under the Ex Post Facto Prohibition. (Petition at 13). However, this also is a settled matter. The Sixth Circuit majority correctly noted this Court's use of the *Kennedy* factors in *Kansas v. Hendricks*, 521 U.S. 346, 360-69 (1997) to review whether there was a punishment for purposes of either the Double Jeopardy Clause or the Ex Post Facto Prohibition. "Using this approach, we conclude, once again, that the [Tennessee] Act was not

intended to punish, and its requirements do not transform the law into punishment" under the ex post facto analysis. *Cutshall*, 193 F.3d at 477.

C. The Sixth Circuit correctly determined that petitioner's right to travel interstate was not affected by the Tennessee Act.

In a single sentence, petitioner asserts without citation to authority that the "legislative history" reflects that the Tennessee Act was "intended to interfere with Petitioner's constitutional right to travel freely between the states." (Petition at 25). He cannot and does not show any actual interference under *Attorney General v. Soto-Lopez*, 476 U.S. 898, 903 (1986). Citing *Salibra v. Supreme Court of Ohio*, 730 F.2d 1059, 1064-65 (6th Cir. 1984), the lower court found that the "Tennessee Act applies to all sex offenders residing in Tennessee regardless of where they were convicted," that the Act "contains no duration of residency restriction," and that, since all 50 states now have sex offender registries, "Tennessee is no more or less attractive than any other state for a sex offender seeking a place to reside in total anonymity." *Cutshall*, 193 F.3d at 478.

D. The Sixth Circuit correctly ruled that the Tennessee Act produces no "stigma plus."

Presuming that registration and any release of registry information to the public produces a "stigma," petitioner urges that a change in legal status produces the "plus" contemplated by this Court in *Paul v. Davis*, 424 U.S. 693 (1976). (Petition at 21-22). The court of appeals,

however, correctly found that the Act triggers no requirement for constitutional procedural due process.

In this Court, petitioner relies upon the rationale of *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), to find a change of status in the registration requirement itself: the "burden" of keeping registry information current, the criminal sanction for failing to comply with the Tennessee Act, and the possibility that law enforcement may disseminate his registry information to the public. (Petition at 22). In this way, petitioner has used registration and any release of registry information to meet both the "stigma" and the "plus" requirements, a logical impossibility. Moreover, the Sixth Circuit correctly found the "burden" of compliance to be "small." *Cutshall*, 193 F.3d at 476. The existence of a criminal sanction for noncompliance is not itself an alteration of any legal status; a valid law may certainly include an enforcement mechanism.

In the Sixth Circuit, petitioner claimed "that loss of employment and violation of his privacy rights satisf[ied] the 'plus' requirement. . . . " *Cutshall*, 193 F.3d at 479. As discussed more fully below, the court of appeals correctly ruled that there is no "general right to private employment," that the Tennessee Act did not prevent him from obtaining government employment, and that petitioner has no right to keep registry information private. *Id.* at 479-80.

E. The Sixth Circuit correctly ruled that the Tennessee Act "does not implicate a constitutionally protected liberty or property interest in employment."

Petitioner finds a general "right to pursue gainful employment" under *Board of Regents v. Roth*, 408 U.S. 564, 573-74 (1972) and *Lange-Kessler v. Department of Education of the State of New York*, 109 F.3d 137, 140 (2d Cir. 1997), a right that he contends is "affected by the Act." (Petition at 23). The Sixth Circuit correctly rejected petitioner's argument that there is a "general right to private employment." *Cutshall*, 193 F.3d at 480. Under *Roth*, a constitutionally protected right to employment has been recognized for government employees where either state law or an agreement limits the ability of the government to terminate that employment.

Petitioner does not challenge the lower court's finding that the Tennessee Act "in no way infringes upon Cutshall's ability to seek, obtain, and maintain a job" or prevent "him from obtaining government employment." *Cutshall*, 193 F.3d at 480. Petitioner simply asks in conclusory fashion that this Court believe that the Tennessee Act was "intended" to and will affect an "offender's employment." (Petition at 23).

F. The Sixth Circuit correctly determined that petitioner has no right to keep registry information private.

The court of appeals correctly rejected the district court's finding that petitioner has such a right under *U.S. Dept of Justice v. Reporters Comm. for Freedom of the Press*,

489 U.S. 749, 767 (1989), a case involving the statutory construction of the Freedom of Information Act. *Cutshall*, 193 F.3d at 481. The court of appeals relied instead upon *Whalen v. Roe*, 429 U.S. 589 (1977), finding that the "Constitution does not provide Cutshall with a right to keep his registry information private, and the Act does not impose any restrictions on his personal rights that are fundamental or implicit in the concept of ordered liberty, such as his procreative or marital rights." *Cutshall*, 193 F.3d at 481. Petitioner presents no argument to the contrary, but urges this Court to create a new privacy interest specifically to fit this case.

In the context of his "stigma plus" argument, petitioner asks this Court to depart from *Whalen* and to recognize an expansive new constitutional privacy interest based upon a dissent by Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), and a statutory interpretation of the Freedom of Information Act in *Reporters Comm. for Freedom of the Press*, 489 U.S. at 767. As argued above, the court of appeals correctly refused to recognize such an interest. Petitioner has presented no compelling reason why this Court should depart from *Whalen* and extend constitutional privacy to addresses and phone numbers.

2. The alleged conflict between the Sixth Circuit's decision in this case and its own holding in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), does not warrant this Court's review.

Petitioner also contends that the holding in this case conflicts with the Sixth Circuit's ruling in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). But any inconsistency between the decision below and prior Sixth Circuit precedent is for that court to resolve and does not justify review by this Court. *Braxton v. United States*, 500 U.S. 344 (1991).

In any event, there is no conflict between the ruling in *Kallstrom* and the ruling in *Cutshall*. In *Kallstrom*, the city released information from the personnel files of undercover law enforcement officers to the attorneys for drug dealers who were known to be violent and who had been investigated by the officers in question. *Kallstrom*, 136 F.3d at 1059. The court of appeals ruled that where the government "clearly should have known that its actions specifically" would endanger an individual there should be no release of any "private information [that] places an individual at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat." *Id.* at 1064, 1066. Citing *Doe v. Pataki*, 940 F.Supp. 603, 608-11 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 120 F.3d 1263 (2d Cir. 1997), petitioner attempts to conjure a specific threat to bring himself within the rule of *Kallstrom*. (Petition at 25). Petitioner's reliance on *Pataki* as presenting an "undisputed record of numerous acts of physical harm directed at registrants and their families" is an exaggeration and is misplaced reliance upon random events from four years ago in New York, New

Jersey, and Oregon. The *Pataki* opinion does not bring petitioner within the specific, particularized rule set out in *Kallstrom*. Indeed, petitioner made no attempt to litigate *Kallstrom* issues in the district court, and made no factual showing of any specific threat or risk of harm facing him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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